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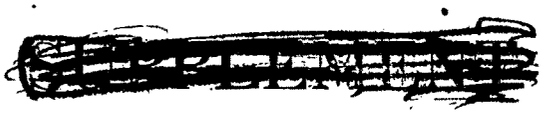
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THE TWENTY-SECOND YEAR OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE*

By MANLEY O. HUDSON

Its twenty-second year was a lean year for the Permanent Court of International Justice. No meeting was held by the Court, no case was referred to it, and no prospect appeared for an early resumption of its activities.

The bench of the Court remains intact. Twelve judges are still in office, and the President and Registrar still function from Geneva. As only nine judges are required for a quorum, the possibility of a meeting of the Court continues to exist. The presence of only five judges is required for a meeting of the Chamber for Summary Procedure, and of this number some may be judges *ad hoc*.

The budget of the Court for 1944, prepared by the Registrar and approved by the President, was voted by the Supervisory Commission of the League of Nations at its meeting in Montreal, July 27–28, 1943. A total expenditure of 212,692 florins (about $115,000) was authorized for 1944.[1]

The publications of the Court have been continued through recent years. A fourth edition of Series D, No. 1, reproducing the texts of the Statute and the Rules of Court, appeared in 1941. Volume 88 of Series C, containing the pleadings, oral statements, and documents relating to the Court's judgment of April 4, 1939, in the case of *The Electricity Company of Sofia and Bulgaria*, appeared in 1942. During 1943 a Fourth Addendum to Series D, No. 2, was published (in English only), containing a systatic elaboration of the minutes of the Court in 1934, 1935, and 1936 while it was engaged in the preparation of the Rules of Court of March 11, 1936. These minutes had previously been published in the Third Addendum to Series D, No. 2; as the volume was very bulky, containing 1092 pages, and arranged chronologically, it was in the words of the Registrar both "unwieldy and somewhat difficult to consult." The Fourth Addendum, containing 412 pages, is designed to enable "a reader to follow the history of a given article through the various stages of the revision to its final adoption, without constant reference backward or forward and consultation of the indexes and annexes." The publication of the new volume, which should prove most useful as a lawyer's guide to the Rules, was made possible by a grant of funds from the Carnegie Endowment for International Peace.

*This is the twenty-second in the writer's series of annual articles on the organization and work of the Permanent Court of International Justice, the publication of which was begun in this JOURNAL in 1923 (Vol. 17, p. 15).

[1] League of Nations Document C.24(b).M.24(b).1943.X.

The continued interest of States in the preservation of the Court has manifested in the quite recent conclusion of treaties giving it jurisdicti The number of such treaties concluded since the beginning of the war in 19 is impressive. A treaty of non-aggression, conciliation, arbitration, a judicial settlement between Colombia and Venezuela, signed on Decembe 17, 1939, and brought into force on September 12, 1941, provides for the submission of certain categories of disputes to the Court or to an arbitral tribunal to be agreed upon; if the parties are unable to agree that a dispute falls within one of these categories, the preliminary question is to be decided by the Court; if the parties fail to agree upon a *compromis*, either party may after notice file an application with the Court; and differences arising as to the interpretation or application of the provisions of the treaty may be referred to the Court by an application by either party.[2] Quite similar provisions were included in the treaty for the pacific settlement of disputes between Brazil and Venezuela, signed on March 30, 1940, and brought into force on January 9, 1941.[3] On March 14, 1940, Norway and Venezuela concluded a treaty of commerce and navigation, providing, *inter alia*, that any dispute as to the interpretation of application of its dispositions might be referred to the Court by application by either party, unless the two parties should agree upon referring the question to a special arbitral tribunal.[4] On July 17, 1940, Egypt and Great Britain entered into a convention concerning the abolition of the Egyptian *Caisse de la dette publique*, which provides:

> Any difference of opinion between the contracting Governments on the subject of the interpretation or the application of the present Convention which cannot be decided through the diplomatic channel will be submitted, at the request of one or other of the Governments, to the Permanent Court of International Justice for judgment.[5]

An identical provision is included in a convention between Egypt and France of August 3, 194

On May 8, 1942, the Argentine Republic and Chile entered into a convention for the regulation of aerial navigation which provides for a procedure of conciliation for disputes with reference to the interpretation or execution of the convention, and if the parties fail to agree on setting up the conciliation commission, or if one party refuses to accept the decision of the commission, obligatory jurisdiction is conferred on the Court, which is to decide *ex aequo et bono* unless this course is opposed by a party.[7]

Interest in the future of the Court has recently been manifested in other countries also. In an address on September 12, 1943, the Secretary of State

[2] For the text, see 69 *Gaceta Oficial de Venezuela* (1941), pp. 133,822–133,825.
[3] For the text, see *ibid.*, pp. 130,837 and 130,968.
[4] For the text see 2 *Libro Amarillo de Venezuela*, 1941, p. 42
[5] Translation from 202 League of Nations Treaty Series, p. 97.
[6] *Ibid.*, p. 121.
[7] 5 *Revista Argentina de Derecho Internacional* (2d ser., 1942), pp. 493–504.

of the United States of America declared that "disputes of a legal character which present a threat to the peace of the world should be adjudicated by an international court of justice whose decisions would be based upon application of principles of law," and he announced that attention was being given to "the extent to which the existing court of international justice may or may not need to be remodelled." [8] The Moscow Declaration of October 30, 1943, opens a prospect for the future of the Court by its emphasis on "the necessity of establishing at the earliest practicable date a general international organization . . . for the maintenance of international peace and security." [9]

In unofficial quarters interest in the Court continues unabated. The Inter-American Bar Association, meeting at Rio de Janeiro on August 7–12, 1943, adopted a resolution declaring that "the Permanent Court of International Justice should be maintained with the modifications necessary to adapt its Statute to changed circumstances and to the exigencies of the international community. In particular, there should be preserved in its organization, as at present, the fundamental democratic principle of judicial independence and of the separation of the judicial, legislative and executive branches." [10] On August 24, 1943, the Section of International and Comparative Law of the American Bar Association resolved that "any post-war international settlement should make provision for an international court of justice with a compulsory jurisdiction of legal issues and should continue the present Permanent Court with such modification of its Statute as may be necessary to adapt it to the new conditions."

In 1943 the Carnegie Endowment for International Peace published a fourth volume of its series of *World Court Reports;* this collection, designed to make the English texts of the Court's judgments more readily accessible to the profession, has thus been brought up to date. The texts of the basic instruments relating to the Court, with information concerning them, have recently been re-published in *International Conciliation.*[11]

In a competent study published recently the role played by the Court in connection with the Minorities Treaties is surveyed, with the conclusion that "rejecting considerations of political expediency or influence" it "operated with scrupulous impartiality as the protector of the rights of minorities," and always put the spirit of the law before its letter." [12]

[8] 9 Department of State Bulletin (1943), pp. 177, 178.

[9] *Ibid.*, p. 309.

[10] This JOURNAL, Vol. 37 (1943), p. 669.

[11] No. 388 (March, 1943).

[12] Jacob Robinson and others, Were the Minorities Treaties a Failure? (New York: Institute of Jewish Affairs, 1943), pp. 149–150.

THE COÖRDINATION OF INTER-AMERICAN PEACE AGREEMENTS

By CHARLES G. FENWICK

Of the Board of Editors

During the course of some thirteen years, from the Fifth International Conference of American States at Santiago in 1923 to the Conference for the Maintenance of Peace at Buenos Aires in 1936, the American Republics adopted a wide variety of treaties and conventions dealing with the pacific settlement of disputes arising between them. These agreements cover all of the generally accepted procedures, except that of judicial settlement in the sense of submission to a permanent court as distinct from an arbitral tribunal. Each of the separate procedures appears to have been adopted without any plan of coördinating it with other procedures, with the result that there is duplication and overlapping of provisions and occasionally open contradiction. There is no logical progression of obligations so that a dispute could, at the initiative of a plaintiff State, go forward from one procedure to another until final settlement.[1] More serious still, the failure of a large number of the American States to ratify the various treaties has left the general obligation of pacific settlement in a state of complete uncertainty.[2]

At the Montevideo Conference of 1933 the Mexican Delegation introduced a Peace Code which sought to coördinate in a single instrument the different principles and procedures for the maintenance of peace.[3] The Code was drafted with great skill and offered a well-integrated system which closed most of the loopholes of evasion left open in earlier treaties. In view, however, of the fact that the Code contained a number of novel provisions, the Conference did no more than refer it to the American Governments for their consideration.[4]

[1] The various inter-American procedures admit of practically interminable delays. The reason for this is due, perhaps, not so much to a deliberate drafting of the obligations so as to permit evasions as to the lack of progression from one procedure to another and the absence of time-limits in the application of the several procedures.

[2] Treaties providing for peaceful procedures between the American States come into effect between the States ratifying them; but when a later treaty modifies an earlier one it is a complicated matter to determine the obligations of a particular State towards twenty other States, some of which have ratified one treaty, some another, some neither treaty. See on this point the observations of Dr. Luis Anderson in his report on the Mexican Peace Code, quoting the words of Dr. Parra Perez at the Buenos Aires Conference of 1936. Pan American Union, Improvement and Coördination of Inter-American Peace Instruments, Vol. II, p. 127.

[3] For the text, see International Conferences of American States, Supp. 1933–1940, p. 51.

[4] The resolution (XXXV) of the Conference was accompanied by a preamble referring to

At the Buenos Aires Conference of 1936 the Mexican delegation presented a revised edition of its Peace Code.[5] This time the Code was referred to the Committee of Experts for the Codification of International Law, with instructions to take it into consideration, among other proposals, in preparing the project on the coördination of American peace instruments which the Committee was called upon to undertake for presentation at the coming conference at Lima in 1938.[6] The Committee of Experts revised the Code and presented it to the Lima Conference, accompanied by two separate reports, a briefer one by the Committee itself and a more detailed one by Dr. Luis Anderson, a member of the Committee.[7]

In addition to the Mexican Code the Lima Conference had before it a project presented by the United States delegation under the title: Treaty of Consolidation of American Peace Agreements.[8] The American project not only sought, like the Mexican one, to bring the various procedures together in a single instrument, but it introduced a number of novel features looking to the improvement of the procedure of conciliation around which the project centered. The project, however, contained no reference to a definition of aggressor, an inter-American court of justice, and other provisions of the Mexican code which went beyond existing agreements.

The Lima conference, like those that preceded it, was unable to come to a conclusion upon the matter. The result was that the two projects of coördination, as well as numerous other projects for the improvement of the existing procedures of pacific settlement and for the creation of an American League of Nations and an Inter-American Court of Justice were referred to the International Conference of American Jurists with instructions to prepare a report upon the subject for submission to the Bogotá conference scheduled for 1943.[9] As a last step, the Governing Board of the Pan American Union, foreseeing the difficult problem with which the International Conference of American Jurists would be presented and the limited time available for the study of the great variety of projects, called upon the Inter-American Juridical Committee to undertake the preparation of a coördinated peace agreement, to be submitted to the American Govern-

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"the advantages which would be offered by the concentration and arrangement in a single instrument of all the provisions scattered throughout different treaties and other pertinent principles for the prevention and peaceful settlement of international conflicts"; *ibid.*

[5] For the text, see Pan American Union, Improvement of Peace Instruments, Vol. II, p. 84.

[6] Resolution (XXVIII), Code of Peace, International Conferences of American States, 1933–1940, p. 161.

[7] Improvement of Peace Instruments, Vol. II, pp. 121, 124.

[8] For the text of the project, see Report of the Delegation of the United States of America to the Eighth International Conference of American States, p. 193.

[9] Resolution (XV), Perfection and Coördination of Inter-American Peace Instruments, International Conferences of American States, 1933–1940, p. 244.

ments for observation and comment prior to its submission to the Conference of American Jurists.[10]

A preliminary inquiry might be made whether, under the circumstances, it is desirable to seek to coördinate the existing peaceful procedures of the American States when it is still uncertain what is to be the character of post-war international organization. Obviously the development of international law which may be expected to follow a stronger system of collective security, as well as the reëstablishment of the Permanent Court of International Justice with obligatory jurisdiction over a wider field, must have both direct and indirect effects upon the nature and application of whatever procedures for the settlement of disputes the American States may undertake to adopt. Moreover, the regional system of inter-American relations, in the field of law as well as that of politics, must in the future be more closely integrated with the universal system than was the case during the two decades between the first World War and the second. For the present, therefore, only tentative conclusions can be arrived at, and the only justification for the preparation by the Juridical Committee of the draft of a coordinated treaty, apart from meeting the request of the Governing Board of the Pan American Union, is the possible clarification of the problem so that a decision may be taken upon it when the appropriate time comes. If the general international organization to be created at the close of the war should develop gradually from the practical experience of the United Nations, the integration of the inter-American regional system with the universal system may proceed by equally slow stages, without calling for radical changes in established procedures; and on the other hand it is possible that the recent development of the inter-American system may have to be modified greatly if the new international organization takes on at once a highly organized institutional character. With this caution, some considerations may be offered with respect to the general content of a treaty for the coordination of peaceful procedures between the American States.

Obviously the first article of a consolidated treaty must lay down the obligation of peaceful settlement in unconditional terms. The provisions of the Gondra Treaty of 1923 in this respect are now out of date. Article I of the Gondra Treaty, after setting forth the obligation of submitting controversies to investigation, pledges the contracting parties not to begin mobilization or concentration of troops on the frontiers of the other party during the time the procedure provided for in the treaty is in progress. The exception is inconsistent with the pledges of pacific settlement contained both in the Treaty for the Renunciation of War of 1928 and in the Anti-War Treaty of 1933 and it is even more inconsistent with later resolutions

[10] Letter of May 7, 1943, enclosing a report of the Committee of the Governing Board on the Codification of International Law presented under date of March 19. The views expressed in the present article are no more than the personal observations of the writer, and they do not necessarily reflect the views of the other members of the Juridical Committee.

and declarations of inter-American conferences and consultative meetings.[11] The existing state of international law may not make it feasible to insist upon arbitration or judicial settlement for all disputes; but in every case the alternative to arbitration or to judicial settlement must be a resort to conciliation, or to some other special procedure. Measures of self-help by either of the parties in controversy must be made illegal under all conditions and circumstances, even if it may be necessary on occasion to maintain the *status quo* pending the adoption of new rules of international law.[12]

A novel procedure was proposed at the Buenos Aires Conference of 1936 which resulted in a treaty for "The Prevention of Controversies." This procedure, put forward and ably urged by the Chilean delegation, had two chief objects in view: first, the study of the causes of future difficulties or controversies, and secondly, the proposal of appropriate measures for obtaining compliance with treaties in force between the respective parties. Permanent bilateral mixed commissions were to be appointed to carry out the assigned functions. The proposed procedure met with considerable opposition in the subcommittee which considered it; and the fact that the treaty has not been put into effect would appear to indicate that on more mature consideration the American Governments are of the opinion that the functions assigned to the proposed commissions can best be left to the respective foreign offices.[13] The subsequent adoption by the consultative meeting of Foreign Ministers at Habana of a resolution recommending the organization of a committee for the purpose of insuring the prompt solution

[11] Both treaties clearly ban all wars except wars of self-defense. But in case reliance upon Secretary Kellogg's note of June 23, 1928, should lead to too broad an interpretation of self-defense, the terms of the Convention to Coördinate, Extend, and Assure the Fulfillment of Existing Treaties, adopted at Buenos Aires in 1936, appear to subject the decision of a particular State to the collective public opinion of the consultative meeting of Foreign Ministers. See below, note 43. The declaration (XXI) on Continental Solidarity in Observance of Treaties, adopted at the meeting of Foreign Ministers at Rio de Janeiro in 1942, reaffirms the applicability of the procedure of consultation in the event of the alleged violation of a treaty between American States resulting in a threat to the peace. Pan American Union, Report on the Third Meeting of the Ministers of Foreign Affairs of the American Republics, p. 50.

[12] It is frequently said that if there is to be peace between nations a peaceful solution must be found for every controversy. If so, the maintenance of the *status quo* may be at times the necessary solution of a controversy between States, just as it frequently is between individuals pending remedial action by the legislative organ of the State. See below, n. 43.

[13] The discussion of the Chilean project by the First Commission on the Organization of Peace may be found in the *Diario* of the Conference, December 18, 19, 1936. In answer to the reporter's objections and those of others, reference was made by the Chilean delegate to the similar commissions established in commercial treaties between Chile and other States and to the Canadian-United States Joint High Commission. *Actas* of the Conference, p. 162.

While two-thirds of the American States have ratified the Treaty for the Prevention of Controversies, none of them, to the knowledge of the Pan American Union, have undertaken to designate the members of the bilateral mixed commissions called for by the treaty.

of disputes and of suggesting the measures and steps conducive to a settlement would suggest that a small permanent committee was regarded as preferable to the numerous bilateral mixed commissions.[14]

The old and established procedure of good offices and mediation, in accordance with which a third government, friendly to both parties, offers its aid in effecting the settlement of a controversy between two states, was given a definite legal character by the Hague Conferences of 1899 and 1907, and the American governments, being signatories of the Convention of 1907, have always recognized that procedure as part of their own inter-American system.[15] But a new and distinct form of the procedure was introduced by the Brazilian delegation at the Buenos Aires Conference of 1936 and was incorporated into the Inter-American Treaty on Good Offices and Mediation.[16] Strictly speaking the procedure set forth in the treaty is not so much "mediation," which contemplates the intervention of third States, as a simple and ready method of conciliation, in which the mediator, a private individual selected from a general list or panel composed of persons previously designated by the American governments as eminently fitted for the task, undertakes to bring the two parties to agree upon a peaceful settlement. No provision is made for a report by the mediator, and the discussions

[14] This resolution (XIV), entitled "The Peaceful Solution of Conflicts," has also not yet been put into effect. It calls for a committee of five members to be organized by the Pan American Union. The following countries were selected to designate members to the committee: Argentina, Brazil, Cuba, Mexico and the United States. But because of the reservations made by a number of governments, it was not found advisable to proceed with the actual organization of the committee. For the steps taken to carry out the resolution, see Reports of the Special Committee of the Governing Board of the Pan American Union, approved October 2, December 4, 1940, January 8, 1941.

[15] The term "mediation" appears as far back as the Treaty of Perpetual Union signed in 1826 at the close of the Congress of Panama. International Conferences, 1889–1928, p. XXIV. The traditional procedure of good offices and mediation formed part of the Treaty on Compulsory Arbitration signed at the Second International Conference of American States at Mexico City in 1902. *Ibid.*, p. 100. A resolution (XXXVI) on Good Offices and Mediation, was adopted at Montevideo in 1933, to the effect that it should never be deemed an unfriendly act for any State or States to offer their good offices or mediation. The proviso is added that the method of settlement shall not be applicable when other methods of peaceful solution provided for by the treaty shall have begun to function. *Ibid.*, 1933–1940, p. 65. Article 5 of the General Convention of Inter-American Conciliation gives indirect recognition to the procedure by a provision that nothing in the convention should preclude the tender of their good offices or their mediation by the contracting parties "on their own motion or at the request of one or more of the Parties to the controversy," provided the procedure of conciliation is not in progress. *Ibid.*, 1889–1928, p. 456. The United States draft Treaty of Consolidation of American Peace Instruments, changes the negative provision of the Conciliation Convention into a positive provision that the contracting States "have authority" to interpose by way of tendering their good offices and mediation.

[16] For the text of the treaty, see International Conferences, 1933–1940, p. 199. Fifteen governments have ratified the treaty and nine of these have communicated to the Pan American Union their designations for the panel of mediators. Thus far there is no record of use being made of the panel in an actual case.

are conducted in the presence of representatives of both parties, with the mediator acting as chairman. The chief argument made for the procedure at the Buenos Aires Conference was that by its informal character it was adapted to disputes which governments might prefer to settle without the publicity attending the presentation of a case before a formally organized commission or tribunal.[17] The procedure should, therefore, be regarded rather as a continuation of diplomatic negotiations; and if time limits were placed upon recourse to it, it need not unduly delay a definite settlement of the case by the procedures of conciliation and arbitration.

The procedure of conciliation became part of the peace machinery of the American States at the time when the influence of that procedure at Geneva was at its height.[18] The Gondra Treaty of 1923, following in the line of the Wilson-Bryan Treaties for the Advancement of Peace, limited itself to investigation only, not excluding the possibility that the investigation might extend to questions of law as well as questions of fact, but making no provision which would permit the commission of investigation to include in its report suggestions for a just and equitable settlement of the dispute.[19] This deficiency was made good by the General Convention of Inter-American Conciliation of 1929, in which the commissions of inquiry of the Gondra Treaty were given "conciliatory functions."[20] Investigation and conciliation may therefore be developed as a single procedure, although it may be desirable to divide the report of the commission of investigation and conciliation into two separate parts, the one setting forth the facts of the case and the other the bases for an equitable settlement of the controversy.

Arbitration became a part of the inter-American system with the signature of the General Treaty of Inter-American Arbitration in 1929, at the close of the Washington Conference on Conciliation and Arbitration.[21] The treaty follows the traditional lines, modifying slightly the phrasing of the Taft treaties of 1911 with respect to disputes recognized as suitable for submission to arbitration and specifying them more exactly by a reference to the

[17] *Diario* of the Conference, December 18, 1936, pp. 147 ff. In the original Brazilian project the provisions for good offices and mediation were part of a larger scheme providing for consultation and coöperation in case of aggression, with condemnation of the aggressor. These latter were eliminated by the committee in charge on the ground that they were already taken care of by other conventions approved by the committee. While the treaty combines the two procedures of good offices and mediation, the reporter of the committee (Sr. Soto del Corral) emphasized the distinction between the two, "good offices" being the offer of friendly assistance in the settlement of a dispute and "mediation" being the act of giving such assistance. *Ibid.*, p. 148. See also on this point, Hackworth, Digest of International Law, Vol. VI, 24 ff., where the recent practice of the United States is set forth.

[18] See Habicht, Post-War Treaties for the Pacific Settlement of International Disputes, pp. 1001 ff.; Oppenheim (sixth ed., by Lauterpacht), Vol. II, pp. 12 ff.; C. C. Hyde, "The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes," British Year Book of International Law, Vol. X (1929), p. 96.

[19] For the text of the treaty, see International Conferences 1889–1928, p. 285.

[20] *Ibid.*, p. 455.

[21] *Ibid.*, p. 458.

four classes of legal disputes listed in Article 15 of the Covenant of the League of Nations and in Article 36 of the Statute of the Permanent Court of International Justice. Exception is made of disputes which are within the domestic jurisdiction of the parties and which, it is said, "are not controlled by international law," together with disputes affecting the interest or referring to the action of a State not a party to the treaty.[22]

An initial problem arises to determine the respective fields to which the two procedures of conciliation and arbitration should be made applicable in a coördinated treaty. Neither the Mexican Peace Code nor the United States Treaty of Consolidation attempts to give priority to one procedure over the other, both qualifying the obligation of arbitration in the case of "juridical" disputes by a provision permitting the parties to submit the dispute to the alternative procedure of conciliation.[23] This is to fail to take into account the fundamentally different character of the two procedures and to weaken greatly the authority of international law. Assuming that a particular controversy is in fact juridical in character, that it is "susceptible of decision by the application of the principles of law," there is no reason why it should not be so settled. If the controversy is of relatively little importance the parties have still at their disposition the informal procedure of continuing their negotiations in the presence of a mediator, in accordance with the provisions of the Treaty on Good Offices and Mediation.[24]

If, then, the two procedures of conciliation and arbitration are to be coördinated in a single instrument, so as to secure the necessary progression from one to the other, it would seem preferable to put arbitration in the foreground, and to make it definitely obligatory in the case of the disputes specified as suitable for submission to arbitration. Limited as the scope of these disputes may prove to be, the submission of them to arbitration, or it may be to the alternative of judicial settlement, maintains the principle of the priority of the rule of law and also points to the necessity of developing clearer and more explicit rules of international law as the basis of a wider application in the future.[25]

[22] In addition to the exceptions formally set forth in the treaty reservations were entered by as many as thirteen States, most of which, however, deal with denial of justice in relation to pecuniary claims.

[23] This recognition of conciliation as an alternative procedure is also present in the General Act for the Pacific Settlement of International Disputes, signed at Geneva in 1928, but in the General Act the procedure of conciliation is offered as an optional preliminary procedure, failing which resort to arbitration or to judicial settlement becomes obligatory.

[24] The General Treaty of Inter-American Arbitration makes clear the necessity of exhausting diplomatic negotiations before an appeal to arbitration is permissible. For the controversy over this technical point in connection with the Statute of the Permanent Court of International Justice, see Hudson, Permanent Court of International Justice, 366.

[25] The Covenant of the League of Nations, Article 13, did no more than obligate the members of the League to submit to arbitration (subsequently to judicial settlement as well) disputes which they might recognize to be "suitable for submission to arbitration." The Statute of the Permanent Court solved the problem by providing for an optional acceptance

The Washington Treaty of 1929 binds the parties to submit to arbitration disputes which are "juridical in their nature by reason of being susceptible of decision by the application of the principles of law." The debatable issue centers around the phrase "principles of law." It is not time, the argument runs, to discard the familiar distinction between legal and political disputes, or juridical and non-juridical? Have we not come to the point where it must be recognized that all disputes are justiciable if the parties are willing to submit them to judicial settlement? Are there not general principles of justice, of equity, applicable to any and every dispute, and are these principles not in a true sense "principles of law"? Is not international law a "complete" system covering the whole field of the rights and duties of states, so that if there is an honest intent to renounce the use of force any and every controversy becomes justiciable? [26]

The questions go obviously to the very root of international law and they have been exhaustively discussed both in connection with efforts to extend the scope of arbitration and particularly in connection with the jurisdiction of the Permanent Court of International Justice.[27] The problem which they raise is a political as well as a legal one. While the case may be conclusively argued from the point of view of doctrine and of logic that there is a juridical solution for every controversy and that any compromise with an all-inclusive obligation to submit controversies to such a solution is to make concessions to an arbitrary nationalism, yet the fact is that governments are not yet willing to accept such an obligation, and account must be taken of that fact. Conceding that international law is a comprehensive system and that it extends to the whole field of international relations, subjecting certain activities of States to uniform rules and leaving other activities to the free decision of the individual State; conceding, moreover, or rather insisting that it would be preferable to submit any particular controversy to the general principles of international law rather than to continue to recognize the right of the individual State to take the law into its own hands, it still remains true

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of compulsory jurisdiction; but even then the signatories were allowed to enter reservations as to certain types of disputes. By the inter-American treaty of 1929 the parties "bind themselves" to submit to arbitration the specified kinds of controversies, but the exceptions and reservations accompanying the obligation reduce it in fact to a very limited scope.

[26] The classical statement of the argument is to be found in Lauterpacht's treatise on The Function of Law in the International Community. Antedating Lauterpacht's challenging study were numerous discussions of more restricted aspects of the problem. See, in particular, Proceedings of the American Society of International Law, 1924, pp. 44, 57, 126. More recently, the problem is considered in a careful and provocative study by Hans Kelsen, "Compulsory Adjudication of International Disputes," this JOURNAL, Vol. 37 (1943), p. 397.

[27] See, in particular, a careful analysis of the scope of arbitration under the Washington Treaty of 1929 by J. B. Whitton and J. W. Brewer, "The Inter-American Treaty of Arbitration," this JOURNAL, Vol. 25 (1931), p. 447. For a discussion of the problem in connection with the Permanent Court of International Justice, see Hudson, *op. cit.*, § 428, "Scope of jurisdiction under Article 36."

that many of the rules of international law are so general in character as to leave too much to the opinion of the court when matters of vital national interest are at stake.[28] While it is true that if the parties are willing to arbitrate there is no dispute to which a court could not apply the general principles of justice and equity, it does not follow that the unwillingness of one of the parties to arbitrate is due merely to a desire to have its own way against the claims of justice and equity. The codification of international law must be carried very much further before States will be willing to rely upon the judgment of an arbitral tribunal or of a court of justice to decide matters relating to self-defense, to the status of aliens within its territory, to the obligation of treaties in cases where there has been a fundamental change of circumstances, to questions of economic relations, competition for raw materials and foreign markets, and other vital national interests. The gap between the general principles applicable in such cases and the specific application of the principles to the particular facts is still too wide to be filled by the discretion of an arbitral tribunal, and doubtless for some years even by the discretion of a permanent court of justice.[29]

Such questions are non-juridical not because there are no rules of international law applicable to them, but because the rules are still awaiting greater clarification than it has been found possible to give to them of recent years. The efforts made by the League of Nations and by the inter-American conferences and commissions to codify international law have not extended to those fields. It is to be expected that the successful establishment of a new international organization having as its primary object the "wider and permanent system of general security" called for by the Atlantic Charter, and reaffirmed in recent statements of the Allied Powers, will in due time lead to the abandonment of the most rigidly maintained reservations to the jurisdiction of arbitral tribunals or courts of justice. Until that time comes it would seem wiser, however, not to insist in all cases upon a settlement by "principles of law," as the phrase is used in the General Treaty of Inter-American Arbitration, but to offer arbitration and conciliation as alternative methods, provided only that it is made clear and definite that all disputes without exception must be submitted to one or other of the two procedures, and that conciliation shall not leave the aggrieved party without hope of a

[28] The subject is discussed exhaustively by Lauterpacht, *op. cit.*, Part II, who arrives at the conclusion that in so far as the doctrine of the limitation of the international judicial function rests upon the supposed non-existence of legal rules applicable to disputes, it is "contrary to generally accepted principles of positive municipal law and of general jurisprudence."

[29] This is not to deny that governments have on occasion taken advantage of the distinction between juridical and non-juridical disputes to avoid submitting to arbitration disputes which were readily susceptible of decision *ex aequo et bono*, that is, by general principles of justice. But as a practical matter something must be left to the good faith of governments and to the influence of the public opinion of the community, without which no system of peaceful settlement could in any case be effective.

remedy by way of the legislative action of the organized community of nations.[30]

The exceptions from the obligation to arbitrate set forth in Article 2 of the Washington Treaty are phrased in somewhat unusual terms. The controversies to be submitted to arbitration must, in the first place, not include "those which are within the domestic jurisdiction of any of the parties to the dispute and are not controlled by international law." The particle "and" appears to connect two distinct conditions. Some special question, such as the status of aliens, might be a domestic question, but if it were regulated by treaty, then it would be subject to arbitration in respect to the obligations of the treaty.[31] The phrasing of the General Act of Geneva, of 1928, would be clearer: "Disputes concerning questions which by international law are solely within the domestic jurisdiction of States." By "international law" is here meant general international law, the rights enjoyed by all states, which they may limit and restrict by special treaty if they choose. While the reservation, as stated in the form of the Geneva General Act, would seem to be adequately covered by the description of "questions of juridical character" in Article 1 of the treaty, governments will probably demand that it be continued in order to insure that certain matters which they believe to be questions within their domestic jurisdiction shall be considered so whatever any other state may think to be the rule of international law. The separate reservations with which the Washington Treaty is encumbered make clear the desire of the parties that there shall be no misunderstanding of the domestic character of the questions specified. Obviously it can not be hoped to eliminate these reservations until greater progress has been made in the codification of those branches of international law which determine the rights and duties of the parties in the subject matter of the reservation.[32]

The second reservation of Article 2 relates to controversies "which affect

[30] The sharpness of Lauterpacht's attack upon the procedure of conciliation (*op. cit.*, Chap. XII) is chiefly due to the assumption that because the parties are not bound to accept the recommendations of the commission of conciliation the procedure represents only an *attempt* at settlement rather than a final and binding settlement. The answer lies in the extent to which we can look forward to the development of new rules of international law to meet the needs of justice. A static international law would be equally inadequate to hold States to an all-inclusive obligation of judicial settlement.

[31] The phrase "not controlled by international law" has also been interpreted to mean that a particular question was outside the scope of international law. Strictly speaking, if a question is actually "within the domestic jurisdiction of any of the parties," international law recognizes it to be there. What is meant is that there are no general rules of international law upon the particular subject, so that each State is left to handle the matter as its own national interests dictate. See the article by Whitton and Brewer cited in note 27.

[32] An inter-American code covering the responsibility of the state in cases of contract and tort is an outstanding example of the need of progress in the development of specific rules as a condition of extending the jurisdiction of arbitral tribunals. The Committee of Experts tried its hand at formulating such a code in the weeks preceding the Lima Conference of 1938, but without success. See E. Borchard, "The 'Committee of Experts' at the Lima Conference," this JOURNAL, Vol. 33 (1939), pp. 269, 272.

the interest or refer to the action of a State not a party to this treaty." In spite of the traditional character of the reservation as to the interest of a third state, it would seem that the time has come to recognize a distinction between direct and indirect interest, and to provide that if the interest is direct the third state shall be given the right to intervene in the proceedings. If it does not choose to intervene the parties in controversy should be able to proceed between themselves. Even where a right of intervention by a third state exists but is not exercised the award of the tribunal would still not have binding force except between the parties to the case.[33] As for the reservation with reference to the action of a state not a party to the treaty, here again it would seem that the combination in the third state of the right to intervene in the proceedings and the fact of not being bound by the decision if it does not intervene should be sufficient protection for it.[34]

One of the chief legal obstacles to the practical effectiveness of a treaty of arbitration has been the necessity of a preliminary agreement between the parties in each separate case to have recourse to the procedure. If the parties to an arbitration treaty are to reserve the right to enter into a second treaty defining the terms under which they will carry out the first treaty, then the pledges of arbitration may become meaningless; if they do not reserve that right they may find themselves called upon to arbitrate a dispute which they do not regard as justiciable. Article 4 of the General Treaty of Inter-American Arbitration provides that the parties shall formulate by common accord a "special agreement" defining the subject matter of the controversy and other details of the procedure, and that if an accord has not been reached with regard to the agreement within three months, the agreement shall be formulated by the court.[35] It is not clear whether this provision takes away from the parties in controversy the right to decide in each case whether the particular dispute is or is not a "juridical" dispute under the terms of Article 1 of the treaty, a right which, under the existing state of international law, it is necessary to recognize in spite of obvious objections.

[33] Article 62 of the Statute of the Permanent Court of International Justice provides that: "Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party."

[34] The interpretation of the reservation by Judge Hughes, bringing the Monroe Doctrine within the exception as relating to the action of a non-American state, seems somewhat strained. Pan American Peace Plans, p. 32. In any case there are more direct ways, if need be, of excluding a dispute involving the Monroe Doctrine.

[35] In depositing its ratification of the treaty on April 16, 1935, the United States entered an understanding, made a part of the ratification, "that the special agreement in each case shall be made only by the President, and then only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur." President Taft's problem of 1911 was still unsolved.

On the subject of the special agreement called for by the treaty, see R. R. Wilson, "Clauses relating to reference of disputes in obligatory arbitration treaties," this JOURNAL, Vol. 25 (1931), p. 469.

An arbitral tribunal, created for the occasion and possibly having no experience in the application of rules of international law, is not likely to be accepted as an appropriate body to determine so vital a question as the juridical character of the controversy before it. With the establishment of an inter-American court of justice or with the general acceptance of the Statute of the Permanent Court of International Justice, the rule of Article 36 of the Statute of the Permanent Court may be followed, leaving to the court the decision of a dispute as to its jurisdiction.

The Washington Treaty of 1929 made provision for the designation of the arbitral tribunal by agreement of the parties or, in the absence of an agreement, by the nomination by each party of two arbitrators who should in turn select the fifth arbitrator. It would seem desirable to facilitate the selection of the arbitral tribunal by creating a permanent panel of American jurists after the manner of the Hague Permanent Court of Arbitration. In spite of the exaggeration involved in the use of the term "Court" to describe the Hague panel, there is no doubt but that the list of distinguished jurists composing the Hague panel did much to encourage resort to arbitration and to facilitate the selection of the various tribunals.[36] Whether the proposed inter-American panel need be continued if a permanent court of justice should be established is a question which can await the decision of the American states in regard to such a court. In the meantime the list of American jurists could only inspire confidence in the outcome of a resort to arbitration.

Failing reference of a dispute to arbitration, by reason of the fact that it is claimed by one of the parties to be non-juridical in character, the procedure of investigation and conciliation must immediately become the obligatory alternative. How is the commission of investigation and conciliation to be organized? Here we find the provisions of the Anti-War Treaty of 1933 and those of the Additional Protocol of 1933 in direct conflict. The Gondra Treaty of 1923 had contemplated the establishment of a Commission of Inquiry of five members to be chosen at the time the controversy should arise.[37] The Washington Convention of 1929 added conciliatory functions to the procedure of investigation, but left the organization and temporary character of the commission unchanged. Four years later, at Rio de Janeiro, the Anti-War Treaty, without making any specific reference to the Gondra or the Washington treaties, undertook to lay down new provisions for the creation of conciliation commissions, suggesting that the supreme courts of justice of the different governments might be designated preferentially to discharge the duties of the conciliation commission. No change, however, was made in the plan of selecting the commission at the time of the contro-

[36] See M. O. Hudson, "The Permanent Court of Arbitration," this JOURNAL, Vol. 27 (1933), p. 440. The panel here proposed might also be made to serve for the establishment of commissions of investigation and conciliation. See below, note 40.

[37] The two so-called "permanent" commissions established by the Gondra Treaty (Art. III) were merely diplomatic bodies whose functions were limited to receiving from the parties in controversy the request for a convocation of the actual commission of inquiry.

versy. Less than three months later, however, on December 26, 1933, the Additional Protocol to the General Convention of Inter-American Conciliation was signed at Montevideo, abandoning the system of creating commissions when the occasion for them should arise and providing for permanent commissions, the appointed members of which were to be designated at the time of the deposit of the ratifications of the protocol and the fifth members to be chosen by the procedure of the Gondra Treaty.[38] No terms were fixed for the commissions, so that, although nominally permanent, the appointed members could be changed from time to time in order that they might continue to reflect the confidence of the different governments.

Thus far (December, 1943) only twelve of the American States have ratified the Additional Protocol, and, in the absence of a provision as to the priority to be given to one treaty over the other, there is an open conflict with the obligations of the Anti-War Treaty, ratified by all but one.[39] Taking the Additional Protocol on its merits, however, it would seem undesirable to continue the system of permanent conciliation commissions. Present confidence in the membership of a commission of investigation and conciliation would be an almost essential condition of its effectiveness; and while a government could change the personnel of its permanent commission if it saw fit to do so, the impression created by such changes might at times not be a good one. It would seem better to retain the original character of the commissions as bodies created for the settlement of controversies as they arise, and to facilitate the designation of the personnel of the commissions on such occasions by providing that they should be chosen by preference from the same permanent panel of jurists created to facilitate the selection of arbitration tribunals.[40]

If the procedure of investigation and conciliation is to be an obligatory

[38] For the text of the Protocol, see International Conferences, 1933–1940, p. 120. The Pan American Union is called upon to initiate measures to bring about the nomination of the fifth member of the commission in accordance with the provisions of the Gondra Treaty. The task has proved to be a singularly difficult and complicated one. Seven governments have appointed their respective members to the commissions, making twenty-one bilateral commissions, but only two of these (1943) have been constituted by the designation of fifth members. "If all countries were to ratify the Protocol and appoint their respective members and all commissions became established, the number of commissions would amount to 219" (data from the Juridical Division, Pan American Union).

[39] In as much as the Protocol is in force between the states which have ratified it and the Anti-War Treaty is likewise in force between the same states and others, it would appear that in the event of a controversy between the United States, for example, and the Dominican Republic, the matter would be referred to the Permanent Commission of Investigation and Conciliation existing between them, whereas in the case of a controversy with Panama, a special commission would be created under the Gondra Treaty.

[40] There would seem to be no substantial difference between the qualifications appropriate to members of a panel of possible arbitrators and to members of a panel of conciliators. Nor does there appear to be any reason why the panel of mediators, established by the Treaty on Good Offices and Mediation, should not be the same as the panel of arbitrators and of conciliators.

alternative for all disputes without exception which the parties are unwilling to submit to arbitration as being non-juridical in character, it would seem that the limitations to the conciliation procedure set forth in Article V of the Anti-War Treaty of 1933 should be eliminated.[41] The provision excluding other limitations was a weak justification for the inclusion of those specified under the third and fourth heads. The cornerstone of any future system of pacific settlement must be an absolute obligation to submit controversies to one or other of alternative procedures. The very fact that a state brings a claim against another indicates that the complainant state believes that a question of international law is involved; and while the defendant state may be permitted to refuse the procedure of arbitration on ground of the uncertainty attending the rule of international law applicable to the controversy, it must at least be willing to submit to an investigation of the circumstances of the dispute and to consider the proposals made for an equitable solution of it. Unless that much is accepted, the consolidated system of pacific procedures would retain the familiar loophole of past treaties.

But what if the report of the commission of investigation and conciliation upon the facts of the case or the recommendations of the commission in respect to an equitable settlement are rejected by the party which stands to lose by the conclusions reached? That leaves the situation in *statu quo*, which obviously has disadvantages. The state in possession of the disputed territory or the disputed goods remains in possession; the state which has refused redress for a wrong continues to refuse; the state which is engaging in objectionable acts continues to engage in them. Nothing can be done by the other party because procedure by force is barred. The case is different from that of a state which loses in a procedure of arbitration, because in the procedure of conciliation the state whose claims are denied has on its side the recommendations of the commission of conciliation which confirm the justice of its claim. Clearly what is needed is legislative action by the whole community, formulating, it may be, a new rule of law upon which a second complaint could be brought, just as under national law legislatures correct from time to time the outworn rules of an earlier generation, and suits can then be brought which would hitherto have been fruitless.[42]

[41] The reservations contained in Article V appear to be a step backward. The reservations under (a) and (b) relate to controversies provided for in other treaties and those which the parties prefer to settle by other procedures. These might better have been stated not as limitations but as general provisions. The limitations under (c) and (d) relate to questions within the exclusive competence of each State and to matters which affect the constitutional precepts of the parties. The Gondra Treaty, following in the tradition of the Treaties for the Advancement of Peace, made no exceptions to the obligation to submit controversies to a commission of inquiry. Nor did the Conciliation Convention of 1929 make any exceptions when the functions of the commissions of inquiry were extended to include conciliation.

[42] Perhaps it has been the prospect of having things continue indefinitely in *statu quo* which has limited the effectiveness of the procedure of conciliation and made resort to it so infrequent. What is really desired by the complainant state is, as has often been pointed out, not

In the absence of such a legislative body what provision is there in inter-American relations for the maintenance of peace and justice? It is here that the system of consultation established at the Conference for the Maintenance of Peace, held at Buenos Aires in 1936, becomes effective. By Article 2 of the Convention to Coördinate, Extend, and Assure the Fulfillment of Existing Treaties the High Contracting Parties agree that if an emergency should arise affecting their common interest in the maintenance of peace they will consult together with the object of assisting, through the tender of friendly good offices and mediation, the fulfillment by the American Republics of their obligations of pacific settlement.[43] The Declaration of Principles of Inter-American Solidarity and Coöperation, adopted at the same conference, also proclaims the principle that "every act susceptible of disturbing the peace of America affects each and every one of them (the American Republics), and justifies the initiation of the procedure of consultation";[44] while the declaration on Continental Solidarity in Observance of Treaties, adopted at the Meeting of Foreign Ministers at Rio de Janeiro in 1942, makes the procedure of consultation specifically applicable in the event of the violation of treaty obligations.[45]

Obviously the purpose of the system of common consultation is to enable the American Republics as a body, acting through their Foreign Ministers, to bring the pressure of public opinion upon the States in controversy and to assist the parties in reaching a peaceful settlement of the dispute upon bases believed by the collective group to be just and equitable. What is to be said of the sanction attached to the procedure of consultation by Article 5 of the Coördination Convention of 1936? The High Contracting Parties agree that if the procedures set forth in the convention should fail and the hostilities should break out between the States in controversy, the others should "through consultation, immediately endeavor to adopt in their character as neutrals a common and solidary attitude, in order to discourage or prevent the spread or prolongation of hostilities." The provision was a clear indication at the time that the American States were not ready to adopt a system of collective security for their own hemispheric circle; but at the same time the numerous loopholes deliberately inserted in the treaty made it clear that those of the American States which were members of the League of Nations were not willing to abandon their obligations under the Covenant.[46] Subsequent declarations of inter-American conferences and

so much the enforcement of actual rights as a change in the law, under which new rights might arise.

[43] For the text of the Convention, see International Conferences, 1933–1940, p. 192.

[44] *Ibid.*, p. 160.

[45] Report on the Third Meeting of the Ministers of Foreign Affairs, Pan American Union, 1942, p. 50.

[46] The Delegation of Colombia, in signing the convention, went so far as to say that the phrase "in their character as neutrals" implied "a new concept of international law which allows a distinction to be drawn between the aggressor and the attacked, and to treat them

consultative meetings would appear to have indirectly repudiated the policy of neutrality, qualified as it was.[47] But more recently the declaration of the United Nations, now including more than two-thirds of the American States, in favor of the establishment of a new and stronger system of collective security, has outdated the provisions of Article 5 of the Coördination Convention. It is now clear that consultation between the American states can not have its proper effect if it is limited to counsels of peaceful settlement which are prohibited from distinguishing between right and wrong, between the state which observes its obligations under inter-American treaties and the state which violates them, between the aggressor and the victim of an attack. Consultation must be accompanied by the duty of the whole group to determine which of the parties is responsible for the breakdown of the prescribed procedures of peaceful settlement.

Public opinion, then, without material sanctions of any kind, remains for the present the only means of enforcing the obligations of pacific settlement accepted by the American Republics in the various treaties entered into since 1923. But with the adoption of the procedure of common consultation in the presence of a threat to the peace, collective public opinion becomes a far more effective means of securing the observance of obligations of pacific settlement than the unorganized public opinion of individual states which operated, or rather failed to operate, in the years antedating the procedure of consultation. It is to be expected, of course, that the establishment of a universal system of collective security, attended probably by sanctions of a military or economic character, will apply equally to the American states. But without anticipating the changes which such a system will introduce, it is possible for the American states to proceed with the development of a unified plan of procedures of peaceful settlement which can readily be coördinated with the universal system when the appropriate time comes.

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differently." Progressive and commendable as this declaration was, it can with difficulty be reconciled with the terms of the convention or with the ideas of the other delegations at the conference.

[47] See, in particular, the Declaration of American Principles, adopted at Lima in 1938, International Conferences, p. 309, the declaration on Maintenance of International Activities in accordance with Christian Morality, adopted at Panama in 1939, *ibid.*, p. 332, and the declaration on Continental Solidarity in the Observance of Treaties, adopted at Rio de Janeiro, 1942, Report, p. 50.

THE TAKING OF HOSTAGES IN THEORY AND PRACTICE

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The current war has been marked by a drastic extension of the practice of taking hostages. Ever since antiquity such action has constituted a permissible expedient, as frequent in peacetime as during war. Only recently, however, has it become a major weapon of warfare. The contemporary experience of total war necessitates a revaluation of the law and practice in regard to hostages. German actions in this war have involved such marked disregard of international law as to bring into question the entire legal foundation of the taking of hostages.

I

In earlier times it was sufficient to define a hostage simply as an individual given, or as a pledge offered, by, or extorted from, a ruler or ruling group to assure a certain course of behavior. But today there must be some effectively binding relationship between the individual hostage and the community from which he is taken if the treatment accorded him is to influence that community's activities. There have been contemporary distortions of the principle of collective responsibility but the principle itself, combined with the necessary representative element, remains at the basis of the modern practice of taking hostages.

The practice has a long tradition. In ancient times the taking of hostages as a precautionary measure against disorder in an occupied region was widespread. The Romans, in the period of their imperial expansion, demanded hostages from the peoples they subjected; they also liked to bring the sons of tributary princes to Rome for extended periods of education.[1] Often the delivery of hostages by one party to another [2] was demanded as evidence of good faith at the conclusion of a treaty or agreement. Hostages were given to secure the promise made by the Icelanders in 999 A.D. to King

[1] See as an isolated example of contemporary practice the dispatch by Herbert L. Matthews in The New York Times, May 16, 1943, on Afghanistan: "The Kabul government has a typically oriental method of helping to keep the tribes in line. The sons of the chieftains are invited to Kabul for schooling. If the chieftain refuses it is a sign of hostility. If, as almost always happens, he agrees, the government has hostages who are sometimes kept in Kabul for years without being allowed to go home."

[2] Only where both parties stood approximately on a plane of equality was there a mutual exchange of hostages.

Olaf Tryggvason that they would accept Christianity.[3] They were also given by the king of Sweden to insure payment for the island sold to him by the Graf Johann von Holstein in 1332.[4] The performance of the treaty of 1174 between William of Scotland and Henry II of England was secured by the delivery of high ranking hostages from Scotland.[5] In the arbitral proceedings of 1351 between Albert the Wise, Duke of Austria, and the town of Zurich, Zurich was required to give hostages.[6] Hostages were also taken for purposes of reprisal, as in 1347, when, at the surrender of the city of Calais to the besieging English forces, Edward III demanded that six of the most prominent citizens of the city be sent to him to do with as he pleased, if the entire population were not to be killed.[7]

In more recent times hostages have been taken in certain general categories: to secure the performance of treaties; to force the payment of requisitions; to protect, or to gain the return of, individuals held by the enemy; for the purpose of reprisals; [8] to maintain order in occupied territory.[9]

Only where treaties are concerned has the practice been abandoned. The Treaty of Aix-la-Chapelle, signed in 1748, which provided for the detention of two English lords in Paris until the restoration of Cape Breton to France, and the Treaty of 1764 between Great Britain and the Seneca Nation, by which the Senecas delivered up three of their chiefs as hostages "to be well treated and restored to them" on "the due performance of these articles," [10] mark the last known examples of this species of hostage-taking. In modern times treaties have become so complex and cover so wide a variety of subjects that the exchange of hostages could have little effect on their performance. In agreements marking the end of a war and a post-war settlement, where strong measures have been deemed necessary to assure compliance, territorial guarantees rather than hostages have been taken.[11]

[3] Ascan Lutteroth, *Der Geisel im Rechtsleben*, Breslau, 1922, p. 197.

[4] *Ibid.*, p. 198.

[5] *Ibid.*

[6] Emmerich de Vattel, The Law of Nations, or the Principles of Natural Law, Bk. II, § 249.

[7] Cambridge Medieval History, New York and Cambridge, 1932, Vol. VII, p. 349.

[8] Compare with statement which G. F. de Martens based on historical practice as viewed in 1864: "*Quoique l'on ne puisse former la liste des cas ou il est permis de prendre des ôtages, on peut observer cependant que cela a lieu surtout pour garantir, 1. la sureté de ceux qu'on envoie pour traiter de capitulation, 2. l'observation des capitulations et autre conventions militaires, 3. le paiement des contributions dictées, le traitement humain de ceux qui sur de départ on laisse chez l'ennemi . . . 6. comme aussi enfin pour user de représailles.*" *Précis du droit des gens moderne de l'Europe*, Paris, 1858, Vol. II, p. 283.

[9] Under certain circumstances, of course, hostage-taking to force requisition payments or for purposes of reprisal will fall under this more inclusive category.

[10] G. F. de Martens, *Recueil des Principaux Traités*, Göttingen, 1791, Vol. I, p. 87.

[11] As examples of this more modern practice the English Manual of Military Law cites the treaty provision for the surrender of Port Arthur in 1905 according to which all the fortifications and forts on three hills, on the highlands, and on the territory southeast of them were handed over to the Japanese army by the Russians "by way of guarantee"; and the

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But throughout the nineteenth century hostages were still taken for other purposes. According to the German War Book, "Their provision has been less used in recent wars, as a result of which some Professors of the law of nations have wrongly decided that the taking of hostages has disappeared from the practice of civilized nations. As a matter of fact it was frequently practiced in the Napoleonic wars; also in the wars of 1848, 1849, and 1859 by the Austrians in Italy; in 1864 and 1866 by Prussia; in the campaigns of the French in Algiers; of the Russians in the Caucasus; of the English in their Colonial wars as being the usual thing." [12] One might go further and add to the German list an example taken from the history of the American Civil War. Spaight cites the carrying off of hostages from Maryland and Pennsylvania by the Confederates, who held them in custody in the South for the duration of the war to secure the "Copperheads" against maltreatment.[13]

These examples notwithstanding, when, toward the end of the nineteenth century, the taking of hostages was reported in two major conflicts, publicists and official opinion generally condemned it. Though their censure of the acts of the Germans in the Franco-Prussian War of 1870 and of the British in the Boer War of 1899 did not make these acts illegal under international law it represented a decided shift in opinion from the complaisant acceptance of the taking of hostages that marked earlier commentaries.[14] Victoria and Grotius had confined their discussion to the treatment of hostages, implicitly accepting the practice and inveighing only against extreme penalties to innocent hostages. But in the late nineteenth century the problem was no longer so simple. It had become necessary to distinguish between the varied applications of the practice and to evaluate each on its individual merits.

Where the Germans took hostages to maintain order among the civilian population no legal objection could be raised. The controversy centered about the German practice of placing prominent French citizens on the engines of trains, allegedly to avoid their being wrecked by civilians. Official German sources hailed the measure as justified by its success.[15] Condemnation came from two sources. Many who had come to view the entire practice of hostages as obsolete challenged it on those grounds. But this sort of criticism, though doubtless well-intentioned, proved little more than the optimism of its authors. Of more importance, for legal practice now as

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Treaty of 1870 according to which the German army continued its occupation of parts of eastern France, handing back sections of the area as the prescribed indemnity payments were completed. English Manual of Military Law, London, 1929, par. 461.

[12] J. H. Morgan, The German War Book, being "The Usages of War on Land" issued by the Great General Staff of the German Army, London, 1915, p. 119.

[13] J. M. Spaight, War Rights on Land, London, 1911, p. 466.

[14] Important as these opinions may be, international law is, of course, formulated only by the actions of states.

[15] Morgan, *op. cit.*, p. 120.

well as then, was the point made by more responsible quarters, that the Germans had allowed no method of differentiating between unauthorized civilian terrorists and the legitimate wrecking activities of raiding parties or individuals of the armed forces of the belligerent.[16] Under cloak of the legal technicality of keeping the civilian population in check, the Germans had perfected an illegal if effective weapon of warfare against the French army.

For a short time during the Boer War the British Field Marshal, Lord Roberts, authorized the placing of enemy civilian hostages on trains for similar purposes, but after eight days the authorization was withdrawn. Despite its brief duration, however, Lord Roberts did not escape a verbal chastisement. In the House of Commons James Bryce deplored the fact that Lord Roberts had "no competent legal advisor with him who would have prevented him from issuing a proclamation so entirely at variance with the recognized authorities on war." [17] The *English Manual of Military Law* itself states unequivocally: "Such measures expose the lives of innocent inhabitants . . . and cannot therefore be considered a commendable practice." [18]

Throughout the nineteenth century, then, the practice of taking hostages did not lapse. Yet the Hague Conventions were strangely silent on the subject. They went into great detail into the conduct of hostilities, but made no mention of hostages.

II

The apparent implication of the Hague Conventions that hostage-taking had become outmoded was in sharp contrast to the recognition that has been accorded the practice in the American, British, and German war manuals. Of the western European powers only the French were unrealistic enough to call the taking of hostages obsolete.

The consideration by the British and American manuals of the taking of hostages is particularly interesting because both lean on the Hague Conventions for their theory and their actual wording. That the Germans frankly champion the use of hostages is less remarkable in view of their attitude toward international law and the Hague Conventions, to which they refer as "sentimentality and flabby emotion" that are "in fundamental contradiction with the nature of war and its object." [19] Although the German government was a signatory to both the Convention of 1899 and that of 1907, its War Book deprecates such international agreements "as absolutely opposed to the nature and aims of war." [20] The German stand, that fear of reprisals

[16] For this type of criticism see *e.g.* the English Manual of Military Law, par. 463.

[17] Great Britain, Parliamentary Debates, 4th ser., Vol. 88, 1900, pp. 623–624.

[18] English Manual of Military Law, par. 463.

[19] Morgan, *op. cit.*, p. 54.

[20] C. P. T. Andler, "Frightfulness" in Theory and Practice as Compared with Franco-British War Usages, London, 1916, p. 116.

is the only sanction for the law of war, is quite different from the position taken by the English who state: "Legitimate warfare is, on the whole at least, secured through several means recognized by international law. Moreover, it is in the interests of a belligerent to prevent his opponent having any justifiable occasion for complaint, because no Power, and especially no Power engaged in a national war, can afford to be wholly regardless of the public opinion of the world." [21]

While jurists were influential in compiling both the American and English manuals of war, the German *Kriegsbrauch im Landkriege* was the work of the German General Staff. Unlike the tendency of the civilian to give more weight to international conventions and enlightened usage, the militarist subordinates everything to his conception of military necessity. Typical of this point of view is the statement of General von Hartmann that "the 'shackles of a constraining legality' in the conduct of war only serve to paralyze belligerents and postpone the termination of hostilities." [22]

Naturally these opposing standpoints have influenced the provisions regarding hostages in the different manuals of war. The American *Rules of Land Warfare* abandon the narrow definition in Lieber's *Instructions* [23] in favor of a brief listing of known practices.[24] Doubtless this non-committal attitude derives from the two-fold fact that American military conflicts have not been very frequent or prolonged and that many of them have been predominantly naval.

The British, however, despite a long tradition of naval warfare, have had sufficient experience in land engagements to feel the need to take a stand on the subject of hostages. They expressly limit the taking of hostages to specific situations—to secure proper treatment of (1) wounded and sick who are left behind in hostile localities and (2) prisoners who have fallen into the hands of irregular troops or of inhabitants who have risen in arms.[25]

Unlike the British, the Germans have made no attempt to limit the practice to specific prescription, nor have they maintained an objective neutrality on the subject as have the Americans. Instead the Germans have concentrated on a general defense of hostage-taking, evaluated only in terms of its

[21] English Manual of Military Law, par. 437.

[22] J. W. Garner, German War Code, Comparison of the German Manual of the Laws of War with those of the United States, Great Britain, France and with the Hague Conventions Respecting the Law and Customs of War on Land, University of Illinois Bulletin, Vol. XV, No. 49, Aug. 5, 1918, p. 14.

[23] No. 54: A hostage is "a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war."

[24] "Hostages have been taken in war for the following purposes: To insure proper treatment of wounded and sick when left behind in hostile localities; to protect the lives of prisoners who have fallen in hands of irregular troops or whose lives have been threatened; to protect lines of communications by placing them on engines of trains in occupied territory; and to insure compliance with requisitions, contributions, etc." U. S. General Staff, Basic Field Manual, 1940, par. 539.

[25] English Manual of Military Law, par. 464.

success. So vague an approach leaves ample excuse for the taking of hostages wherever expediency may dictate. The German avoidance of any declaration as to the limits which are to govern the practice has established an elastic criterion that can have no meaning.

It is in terms of these loopholes left by the German manual that the current German practice of hostage-taking is to be regarded. Two problems confront interested states: the conditions under which hostages may be taken, and their treatment when they are taken. The former is discussed above; the development of the law governing the latter seemed for a long while to present a logical dilemma.

As far back as Victoria objection was raised to the killing of hostages, provided they, as individuals, remained innocent of any crime.[26] Grotius[27] and Vattel[28] reiterated this point.[29] A similar position seems to be taken by the British in the English manual of war when it is declared that hostages are to suffer captivity, not death, if an agreement is violated.[30] The American General Staff states that "when a hostage is accepted, he is treated as a prisoner of war."[31]

Hall makes much of the question that seems to arise as to the value of hostages who, though they may still be taken, may no longer be themselves subjected to severe penalties. He feels that the legal taking of hostages can be effective only when the entire natural leadership of a people is removed.[32] Only in those circumstances will the mere imprisonment of hostages suffice to compel the desired action or inaction by the population from which they are taken. Where a population could not be immobilized in this manner, the practice of hostage-taking seemed to have lost its potency and hence its justification. Although perhaps the most modern of the writers to have taken this stand Hall was not alone in his inclination to regard

[26] Victoria, On the Law of War, Second *Relectio*, s. 43.

[27] Grotius, The Law of War and Peace, Bk. III, § 53.

[28] Vattel, *op. cit.*, pars. 260, 261.

[29] See also the proceedings of the 15th annual meeting of the American Society of International Law, April 27–30, 1921, at which it was generally agreed that hostages should be treated as prisoners of war and not be put to death, no matter what the purpose for which they were taken and even if the giver of the hostage fails in his pledge. American Society of International Law, Proceedings, Vol. XV, p. 105.

[30] English Manual of Military Law, par. 461.

[31] Rules of Land Warfare, par. 359. This identification of hostages with prisoners of war, combined with the requirement that prisoners of war be not killed, leads to an unfortunate and unresolved confusion in the Rules of Land Warfare in view of the fact that the killing of hostages is specifically permitted therein. See below, Notes 66 and 67.

[32] W. E. Hall, A Treatise on International Law, Oxford, 1924 (8th ed., by A. P. Higgins), p. 565. As an example of such an attempt Hall cites a proclamation issued in 1796 by Napoleon in Italy during an insurrection in Lombardy. See *Correspondence de Napoléon*, Vol. II, pp. 323, 327. A possible contemporary parallel might be located in the report from Alexandria on January 9, 1943, that the Italians had transported to Italy in shackles many prominent Greeks, statesmen, religious leaders, soldiers, and newspaper editors. See National Committee for the Restoration of Greece, News from Greece, New York, Vol. II, No. 3.

hostage-taking as so emasculated by this development in theory as to be virtually useless.[33] But for the present the Germans have resolved this logical dilemma regarding the efficacy of hostages. By calculated torture and wholesale killings of hostages that are of a piece with their widespread policy of oppression, they have violated the most rudimentary of human as well as of legal rights and duties.[34]

III

Any well-balanced consideration of the taking of hostages in wartime requires mention of the duties owed by the civilian population to an occupying belligerent if the civilians are to be entitled to any rights from the occupying forces. The occupant has an extensive legal right to maintain order. "In return for such considerate treatment" by the occupier "it is the duty of the inhabitants to carry on their ordinary peaceful pursuits; to behave in an absolutely peaceful manner; to take no part whatever in the hostilities carried on; to refrain from all injurious acts toward their troops or in respect to their operations; and to render strict obedience to the officials of the occupant." [35] This duty of strict obedience is not to be minimized: it is the foundation of effective rule over occupied territory.

In their War Book the Germans discuss the rights owed by the occupant to the civilian population.[36] But in the current war they have made little attempt to translate theory into practice. The German conduct of the war has not been characterized by "mere occasional crimes due to the existence of a state of war and consequent deterioration of normal behavior. . . . On the contrary, what is in question is a criminal campaign well thought out and

[33] For others see *e.g.* Martens, *Précis*, Vol. II, p. 285; also P. de Waxel, *L'Armée d'invasion et la Population*, Leipzig, 1874, pp. 107–108.

[34] In German hands even the attempt to control a population by taking its "natural" leaders as hostages—which Hall suggested as the only means by which bloodshed could be avoided without impairing the value of hostages—has become a form of massacre. For German policy in Poland see *e.g.* this statement by a local police officer at Zgierz: "In 1939 after the murder of one German we shot 10 Poles; today for the death of every German 50 Poles die, and any further incident of this kind will entail the death of 100 Poles for one German. The sentences will not be carried out haphazardly, but will aim at exterminating the Polish intellectual class, which is your leading class." Polish Ministry of Information, Polish Fortnightly Review, London, July 15, 1942, No. 48.

[35] Rules of Land Warfare, par. 301.

[36] Morgan, *op. cit.*, pp. 113–114: ". . . today, the universally prevalent idea is that the inhabitants of the enemy's territory are no longer to be regarded, generally speaking, as enemies. . . . It follows that, . . . as regards the personal position of the inhabitants of the occupied territory, neither in life or in limb, in honour or in freedom, are they to be injured, and that every unlawful killing; every bodily injury; due to fraud or negligence; every insult; every disturbance of domestic peace; every attack or act of violence, are . . . strictly punishable . . . the invading army can only limit their personal independence in so far as the necessity of war unconditionally demands it, . . . As against this right, there is naturally a corresponding duty on the inhabitants to conduct themselves in a really peaceable manner, . . ."

prepared in advance to the slightest detail." [37] In the words of the Inter-Allied Declaration on War Crimes, "the acts of violence inflicted upon the civilian populations have nothing in common with the conceptions of an act of war or of a political crime as understood by civilized nations." [38]

The Germans have violated every duty of the occupying power to the civilian population.[39] Automatically then the oppressed populations are released from any obligation of obedience: they cannot be denied the right of self-defense. The taking of hostages by the Germans for purposes of reprisal and, generally, to maintain order in Europe, can have no legal sanction. Where expediency and legality have coincided, acceptable examples of hostage-taking may be found. But these result more from circumstance than from deference to international law. In no way do they mitigate the illegality of the German position. By destroying the basic legal relationship between the occupant and the civilian, the Germans have created a reign of terror.

Where the entire legal foundation of hostage-taking has been demolished there is little point in attempting to grade different degrees of illegality. It is, however, possible to consider the types of cases in which the Germans have used hostages. In some instances the legal form was maintained, though its basis was lacking; in others the practice of hostage-taking was distorted beyond all reason into a brutal method of repression.

Examples of the taking of hostages to guarantee the payment of requisitions levied on communities are to be found in this war, as they were in the last.[40] Thus the town of Ettelbruck in Luxemburg was fined RM 500,000 as a penalty for the throwing of swastikas into the River Wark; and until this fine was paid several working people were held as hostages.[41] And again, in Poland, a "committee of trustees" in different villages was reported to be held as hostages responsible for the delivery to the Germans of all grain stipulated and requisitioned.[42]

The combined effect of total war and the Nazi ideology in the present conflict tends toward the exercise of control by a firm hold on the freedom and security of individual lives. The hostage-taking process has been simplified, has been made more direct and cruel, by the tendency to eliminate

[37] Inter-Allied Conference, Punishment for War Crimes, London, 1942, p. 10, statement by Msgr. Jan Sramek.

[38] Inter-Allied Declaration on Punishment of War Crimes, January 13, 1942, London, 1942, p. 4.

[39] Compare German action with regard to deportation of forced labor, forced prostitution, and racial and religious oppression, with Hague Convention, 1907, Art. 46: "Family honor, and rights, . . . as well as religious convictions . . . must be respected."

[40] Typical of the first World War is the experience of Brussels, whose Burgomeister, Max, protested that the sum the city was called upon to pay was excessive. The German Military Governor arrested leading citizens as hostages. C. Phillipson, International Law and the Great War, London, 1915, p. 237.

[41] Inter-Allied Information Committee, Axis System of Hostages: Conditions in Occupied Territories I, London, 1942, p. 9.

[42] *Ibid.*, pp. 12–13.

the intermediary and oftimes cushioning stage whereby the allegedly offending population was enabled to make amends in a more limited financial way. By the arbitrary and indiscriminate use of hostages the Germans have attempted both to control and to punish the civilian population and, more, to check the armed forces of the United Nations through civilian hostages.

No single rule governs the selection of hostages by the Germans in occupied Europe. Often they are chosen from the professional groups that enjoy the respect of the populace; [43] often their choice is dictated by the past records of individuals who may have opposed collaboration or in other ways incurred the personal enmity of Nazi officials; [44] and again many are taken at random, from among workmen, peasants, merchants and artisans.[45] Groups of occupational hostages, though less common, have also been taken. Of interest is the Brussels proclamation of July 23, 1942, directed at an uncooperative police force:[46]

> *"En outre, des ôtages, choisis parmis les membres de la Gendarmerie et de la Police seront arrêtés, lesquelles, le cas échéant, auront a répondre de leur vie des actes criminels contre la sécurité de l'autorité occupante commis par des membres de la Gendarmerie et de la Police."*

Sometimes hostages are recruited under stress of the moment without any previous preparation; at other times lists of likely individuals are prepared in advance.[47]

The purposes for which these hostages are taken, control and punishment, cannot in practice be sharply divided because the motives are intermingled. In individual cases differences may mark them off but generally it can be said that hostage-taking for control—as opposed to hostage-taking for punishment which is limited to action by the Nazis after the deed complained of—involves a previous declaration that if a certain act or type of act is committed, hostages taken before or afterward will be penalized. In the Netherlands General Christiansen, head of the German military forces in occupation, issued a proclamation: "Whenever the population follows the enemy's advice we shall hold hostages answerable. Their lives are our security. The population holds the lives of those compatriots in its own hands." [48] By August 24, 1942, one thousand prominent Dutchmen from all walks of life were reported taken hostage in order to reduce sabotage.[49]

From the German zone in Greece it was reported that, on the slightest

[43] For a representative list see Netherlands Information Bureau, Netherlands News, Vol. IV, No. 6, p. 154.

[44] Knickerbocker Weekly, Vol. II, No. 27, p. 14.

[45] Polish Ministry of Information, Black Book of Poland, New York, 1942, p. 92.

[46] News from Belgium, Vol. II, No. 48, photostat between pp. 380–381.

[47] Thus in Norway, for example, police officials in all cities and larger towns received from the National Police Headquarters lists of local residents to be taken as hostages "if occasion should arise." These lists were prepared by the National Police with the aid of the Nasjonal Samling. Royal Norwegian Government, News of Norway, Vol. II, No. 32, p. 129.

[48] Netherlands News, Vol. IV, No. 2, p. 29. [49] *Ibid.*, Vol. V, No. 7a.

suspicion of disorders, the German military authorities were instructed to arrest and hold as hostages leading persons in the districts concerned. In case of any sort of clash with the Greeks the Germans were to shoot some or all of the hostages.[50] In Warsaw hostages were taken before every event of any importance, such as the arrival of prominent military or civil personages. In Polish rural districts the same practice has come to prevail in an attempt to insure order and prevent demonstrations and sabotage against the German troops and the German administrative authorities.[51]

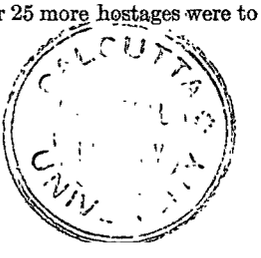
It must be emphasized at this point that the taking and killing of hostages is not of itself illegal. Typical is the proclamation issued by the Mayor of Kroscienko on the Dunajec, by order of the local German authorities. Where this is not part of a general policy of terror and extermination, one may accept, on its individual merits, and regard as legitimate, such an announcement, stating that hostages will be chosen regularly for fourteen day periods, their names to be taken alphabetically according to streets and rural habitations. They "will be responsible for order and public security. This responsibility shall be especially exercised to prevent all acts of sabotage such as the destruction of telephone communications, bridges, etc. In the event of subversive action, if the culprit is not found those persons whose names are posted on this list must answer before the law. The penalty for an act of sabotage is imprisonment or death." [52] Under ordinary wartime circumstances where the occupant has violated no legal duty to the civilian population, hostages may legitimately be taken and, if necessary, killed, to maintain order.

In Belgium the Germans started by offering rewards for the betrayal of saboteurs, then collective fines were levied on villages and towns in the sabotage areas. Ex-servicemen were reimprisoned, held as hostages, and threatened with deportation to Germany.[53] During September, 1941, the German Governor, von Falkenhausen, decreed that at least five hostages should be arrested and shot for each German soldier killed.[54]

In France the executions of many hostages were threatened and carried out because individuals who had committed "crimes" against the Reich were not delivered to the German authorities.[55] This type of attempted control over the occupied countries through hostages has been widespread, though certainly not as successful as the Germans may have wished it to be.

In numerous instances they have gone beyond the taking of hostages for the purpose of staving off anti-German activities by the subject populations. They have resorted to the killing of hostages taken after an act with which

[50] Axis System of Hostages, p. 8.
[51] Black Book of Poland, p. 92.
[52] For complete notice, see *Ibid.*, p. 93.
[53] Axis System of Hostages, p. 3.
[54] *Ibid.*, p. 4.
[55] See The New York Times, dispatch February 13, 1942: 20 hostages were to be shot at Tours if the persons who attacked a Nazi sentry were not found by a specified date; and if unidentified bomb-throwers at Rouen were not located a day later 25 more hostages were to be killed.



they were in no way associated,[56] and indeed sometimes after the actual perpetrators of the act had been identified and killed.[57] On occasion these so-called reprisals [58] have been associated with attempts at control, but the control has degenerated into irresponsible barbarism. The instructions issued for the guidance of the occupying forces in Byelorussia typify this sort of thing: "Any hostile manifestations on the part of the population toward the German armed forces is punishable by death. If a guerrilla remains undiscovered, hostages should be taken from the population. These hostages are to be hanged if the culprits or their accomplices are not delivered within twenty-four hours. Within the next twenty-four hours double the number of hostages should be hanged on the same spot." [59] Apparently it does not matter where the undiscovered guerrilla is. There is no certainty that there is any relationship whatever, even geographic, between the hostage and the guerrilla.

Doubtless the principle that the community is responsible for the acts of its individual members would be cited as justification here. But it is impossible to be sure that any members of the community in question were in any way responsible for, or even cognizant of the acts at issue. Article 50 of the Hague Regulations respecting the Laws and Customs of War on Land states a sound principle: "No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which they cannot be regarded as collectively responsible."

In practice, however, as both the British and American manuals point out, "it may be necessary to resort to reprisals against a locality or community, for some act committed by its inhabitants or members who cannot be identified." [60] Both the British and American manuals agree that "reprisals are never adopted merely for revenge." [61] The British claim that reprisals "must not, however, be excessive, and must not exceed the degree of violation committed by the enemy." [62] The Americans call them "an unavoidable last resort to induce the enemy to desist from illegal practices." [63]

Where necessary, the Americans favor severe action: "Reprisals by the occupant for violation of the laws of war or breach of the occupant's procla-

[56] In the town of Tellevag, Norway, the Germans, after executing one Norwegian for the shooting of two Germans, also executed eighteen hostages, none of whom had any connection with the affair. News of Norway, Vol. II, No. 19, p. 76.

[57] A thief, caught red-handed, mortally wounded a quisling in the presence of the police; the Nazis, nevertheless, called for four hundred hostages. *Ibid.*, No. 20, p. 81.

[58] For a definition of reprisals see Rules of Land Warfare, par. 356. Reprisals are "acts of retaliation resorted to by one belligerent against the enemy individuals or property for illegal acts of warfare . . . for the purpose of enforcing future compliance with the recognized rules of civilized warfare."

[59] Third Molotov Note on German Atrocities, Notes sent . . . to all Governments with which the U.S.S.R. has diplomatic relations (London, 1942), p. 17.

[60] English Manual of Military Law, par. 458; for American parallel see Rules of Land Warfare, par. 358c.

[61] *Ibid.*, par. 358b.

[62] English Manual of Military Law, par. 459.

[63] Rules of Land Warfare, par. 358b.

mations or regulations by enemy individuals not belonging to the armed forces are not prohibited by the above article." [64] The Americans go on to say that "the offending forces or populations generally may lawfully be subjected to appropriate reprisals." [65] Reprisals against prisoners of war are forbidden by the Geneva Convention of 1929. Twice in the *Rules of Land Warfare* it is stated that hostages must be treated as prisoners of war.[66] However, "hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed." [67]

Possibilities of the abuse of the doctrine of collective responsibility have caused the Germans no apparent qualms. The German policy of arbitrary punishment of innocent individuals after the commission of anti-Nazi acts, which has been demonstrated throughout Europe, can be attributed to a cavalier disregard for law and humanity. An explosion on a ship in the Piraeus was followed by the shooting of fifteen Greek hostages chosen at random.[68] In Slovenia fifty Yugoslav hostages were shot by the Germans to avenge the murder of a German leader.[69] In Belgium the murder of the mayor of Charleroi led to the execution of ten hostages.[70] In Paris one hundred hostages were shot "in reprisal for bombing outrages of recent weeks." [71] Another twenty-one French hostages were shot because of the derailment of a German munitions train by undiscovered saboteurs.[72]

The Germans have not only used hostages to control and punish the civilian populations of the occupied countries; they have used civilian hostages also to attempt to control the activities of legally constituted armed forces of the United Nations.[73] The Germans have acted in defiance of the distinction between the civilian and the soldier that is fundamental to the international law of war. Particularly has this been the case in Yugoslavia, where the organized opposition to the Nazis has been found in great strength. On April 11, 1942, for example, it was reported that the Germans had invited General Draja Mikhailovitch and all his followers to surrender within five days. "Should they not comply with this order members of their families will be taken as hostages and held responsible for all they may do. In the same way the families of those who have any connection with Mikhailovitch

[64] Rules of Land Warfare, par. 344. The reference is to the Hague Regulations, Art. 50.
[65] *Ibid.*, par. 358d.
[66] *Ibid.*, pp. 18 and 90.
[67] *Ibid.*, par. 358d.
[68] The New York Times, May 3, 1943.
[69] *Ibid.*, Nov. 4, 1942.
[70] News from Belgium, Vol. II, No. 48, p. 383.
[71] The New York Times, Dec. 24, 1941.
[72] The New York Herald Tribune, May 7, 1941.
[73] Through the use of civilian hostages the Germans have also attempted to control the radio war directed against them from London. Thus in Holland 460 prominent Dutchmen who were held as hostages were threatened that unless the Netherlands Government-in-exile stopped its broadcasts, there will be "an eye for an eye and a tooth for a tooth, but there will be this difference—for every tooth a whole mouthful will be extracted from the hostages who have been arrested;" The New York Times, May 24, 1942.

will be arrested and their property confiscated." [74] Since the nominal fall of Yugoslavia, the Germans have consistently refused to recognize the forces of Mikhailovitch as legal belligerents.[75]

The practice of hostage-taking is today perhaps more widespread than at any other time in its history. Only a United Nations victory will terminate this current illegal German warfare, which has involved the perversion of the practice of hostage-taking. But President Roosevelt's statement that "Civilized people long adopted the basic principle that no man should be punished for the deed of another," [76] is misleading. Actually hostages have been taken throughout recorded history. Today the incidence of total war and the frequent abuse of collective responsibility, necessitate added caution on the part of the occupant, where the one-sided, or unilateral, taking of hostages is in use.

The bilateral exchange of hostages between countries at peace or at war is also to be considered. Here each of the two Powers concerned can, through the other's hostages, maintain a reciprocal check upon the other. In the course of the current war a variety of examples of this bilateral type of hostage-taking can be located. Thus six Vichy French civil servants were held by the British in Syria as hostages for the return of de Gaullists captured by the French. Vichy responded by holding as hostages fourteen Britons at Vals-les-Bains.[77] After negotiation both groups of hostages were released.[78] In the Dutch East Indies, German residents were imprisoned on the invasion of Holland: the Germans responded by taking Dutch hostages.[79] In this instance only the prisoners of the Germans were actually hostages but the bilateral element would militate against ill-treatment by either side.

The Germans have taken American citizens as hostages to secure against maltreatment of German citizens in the United States.[80] To safeguard Brazilians who, with Americans and others, were being held at Compiegne, Brazil seized as hostages the German nationals aboard two repatriation ships then in a Brazilian harbor.[81] More recently it was reported that General Henri Giraud's daughter and four grandchildren were being held as hostages by the Germans, apparently to guarantee the safety of the Bey of Tunis.[82]

[74] The New York Times, April 11, 1942.

[75] Mikhailovitch has derived his authority from the Yugoslav Government-in-exile. On March 1, 1941, his promotion to Divisional General was made known; on Dec. 15, 1941, it was announced that he had been made a full General. On Jan. 13, 1942, it was reported that he had been sworn in by radio as Minister of War in the cabinet of the Government-in-exile. The New York Times, dates cited.

[76] United States, Department of State, Bulletin, Vol. V, No. 122, Oct. 25, 1941, p. 317.

[77] The New York Times, Dec. 6, 1941.

[78] *Ibid.*, Jan. 21, 1942.

[79] Axis System of Hostages, p. 9.

[80] The New York Times, Jan. 29, 1942; *Ibid.*, Jan. 22, 1943.

[81] The New York Herald Tribune, Aug. 21, 1941.

[82] The New York Times, May 17, 1943.

Unlike the unilateral practice, the bilateral form of hostage-taking places neither of the parties in an inferior position. Moreover, it tends to safeguard the individual hostages against ill-treatment. The arbitrary basis for the selection of hostages, generally determined by nationality and geographic proximity, may be deplored, but it cannot be condemned as violating international law.

The bilateral exchange of hostages, however, can never replace the unilateral form. Only in limited instances will two governments or armies each have a sufficient number of hostages from the other to exercise a mutual control. Where the treatment of specific individuals or relatively small groups of individuals is involved, this might be managed. The approximate equality of the two parties that is implicit in the bilateral practice defines the uses to which it can be put. Certainly as a weapon of war it could have little value.

Though the unilateral practice of hostage-taking has assumed so illegal and inhumane a character through contemporary German abuse, this is insufficient to warrant its abandonment as a legal instrument of war. The fact that hostages may be taken, and, if need be, killed, strengthens the position of a law-abiding administrator of occupied territory.

THE END OF DOMINION STATUS

By F. R. Scott

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The present world war has made further changes in the constitutional relations among the nations of the British Commonwealth. This was to be expected, for each great crisis has left its mark on that relationship in the past. The first world war ended the purely colonial period in the history of the Dominions. Their military contributions to the Allied war effort gave them a claim to equal recognition with other small states and to a voice in the formation of policy. This claim was recognized within the Empire by the creation of the Imperial War Cabinet in 1917, and within the community of nations by Dominion signatures to the Treaty of Versailles and by separate Dominion representation in the League of Nations. In this way the "self-governing Dominions," as they were called, emerged as junior members of the international community. Their status defied exact analysis by both international and constitutional lawyers, but it was clear that they were no longer to be regarded simply as colonies of Great Britain. Domestic self-government they had long possessed; international relations were to be their new prerogative.

To the changed position thus acquired the name "Dominion status" was given. It was a useful compromise term. Its main virtue was that it suggested a new and more independent rôle for the Dominions and an individual membership in the world community as well as in the British Empire. This was what the rising national sentiment in these countries demanded. Though no one knew exactly what the new status was, or what its limits were, Great Britain began to offer it to other less favoured portions of the Empire. Ireland was to have "Dominion status" by the Treaty of 1921;[1] India was started on the road to "Dominion status," making "rapid strides towards the control of her own affairs," as Mr. Lloyd George said at the Imperial Conference of that year. Clearly colonialism was being transformed into something new and strange. To acknowledge the abandonment of old style Empire, ruled from the centre, the very name of the association was gradually changed from British Empire to British Commonwealth.[2]

All this represented a great advance in the difficult process of making an

[1] Article I of the Treaty declared "Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada . . . etc." Mr. Lloyd George speaking on the Treaty said it was "difficult and dangerous to give a definition" of what Dominion status meant. See Wheare, The Statute of Westminster and Dominion Status, 2nd ed., London, 1942, p. 21.

[2] The phrase "autonomous nations of an Imperial Commonwealth" appears as early as 1917 in Resolution IX adopted by the Imperial War Conference. In the Irish Treaty cited above (note 1) the term "Empire" had not been abandoned. The famous declaration at the

empire democratic. By long historical association, if not by definition, an empire has been a single political unit in which one group of men rules over another; usually a unit in which one race rules over other races. For this reason all democratic sentiment is strongly opposed to imperialism. The British Empire began by being just such an empire. Down to the war of 1914 not only did the white 15 per cent rule over the coloured 85 per cent of the total population of the Empire, but those members of the white race inhabiting the British Isles ruled their fellow whites in the colonies and Dominions in all important matters of foreign policy. Though some external relations, such as commercial treaties, were beginning to be taken over by the Dominions prior to 1914, decisions as to peace and war, and the major choices in international affairs, were made in London only. The nineteenth century had witnessed the transformation from pure dependency to "self-governing colony," but a "self-governing" colony was still a colony in both domestic and international law despite the contradiction in terms. Even the word "Dominion," which had come into general use in the early part of this century (in 1907 the name "Imperial Conference" was first substituted for the former term "Colonial Conference") did not at first suggest anything like independence or full nationhood. Dominions were colonies in the stage of growing up—colonies in their 'teens, so to speak. They were, in law and in fact, integral parts of a unitary state whose centre of sovereignty was in London. Every Dominion "constitution" was merely a law of the Imperial power extending to a colony, permitting greater or lesser degrees of local self-government. All constitutional lawyers in the Empire emphasized the "indivisibility of the Crown," as proof that the group of countries called British were a unity and not a plurality. And any concept of unity implied an ultimate sovereignty wielded by an Imperial government.

Thus when "Dominion status" was recognized at Versailles in 1919 the word "Dominion" already had a special meaning which was carried forward into the new era and which retarded the development of the new idea. The term "Dominion" embodied two distinct and contradictory notions. On the one hand it suggested a mature type of colony or dependency, in which self-government was far advanced. On the other hand it was by implication and tradition a territory "belonging to" somebody else—a "possession," in short. Dominion means a territory ruled over as well as the process of ruling. It was still true to say that the Dominions were "British," and that Britain was not a Dominion. An element of colonial subordination was implicit in the term itself.

1926 Imperial Conference used both "British Empire" and "British Commonwealth" in the same definition, with typical obscurity. The Statute of Westminster speaks only of the "British Commonwealth of Nations." The term Empire is now used more technically to include Great Britain and the non-self-governing portion of the Commonwealth under her jurisdiction. But the old term "Imperial Conference" has not yet been changed to "Commonwealth Conference."

Adding "status" to a "Dominion" did not immediately clear away this confusion. The new concept grew slowly. At no time was there any agreement as to the end result, or any selected point at which decentralization of an old imperial sovereignty would cease. Did the changes mean that the former self-governing colonies were to attain full international freedom, like independent nations, though linked in some mystical way by a common crown? Or were they still to be on a lower international plane than the mother country, though somewhat freer than before? Or were they, perhaps, to become co-equal members with Great Britain of a group of states all of whom would be governed by a fundamental overriding law, so that some kind of confederation would emerge? No precise answer could be given and none was attempted. The weakness of the concept of "Dominion status" was that it contained at the outset a little of all these ideas but no definable quantity of any. The ultimate relationship was left to work itself out in course of time.

Certainly to many people in the Commonwealth the subordination of the Dominions to the sovereignty of Britain was not ended by the invention of an indefinable status. In 1917 General Smuts observed:

> "although in practice there is great freedom, yet in actual theory the status of the Dominions is of subject character. Whatever we may say, and whatever we may think, we are subject provinces of Great Britain." [3]

This was at the beginning of the new era. In 1921, even after the fanfare of Versailles and the founding of the League, Lloyd George could tell the British House of Commons that:

> "The instrument of the foreign policy of the Empire is the British Foreign Office. That had been accepted by all the Dominions as inevitable. But they claim a voice in determining the lines of our future policy." [4]

The instrument of policy, the Foreign Office, was something well organized and definite; it was also "inevitable." The voice was still an unrealized "claim" to influence "our" (*i.e.* British) policy. Never at any time during the inter-war armistice of 1919–1939 was any Imperial organization established by which the Dominion voices would actually share in making the major political decisions. In this respect the machinery of the League of Nations gave the Dominions more practice in international government and equality of status than did the British Empire. The Imperial Conferences did not meet the need, for they rarely met; [5] they had no executive power; they could merely make recommendations. Yet never at any time in that period was the full international personality of the Dominions, as nations

[3] Quoted by Wheare, *op. cit.*, p. 23.

[4] Quoted in R. MacGregor Dawson, The Development of Dominion Status, Toronto, 1937, p. 211.

[5] Imperial Conferences met in 1921, 1923, 1926, 1930, 1932 (Ottawa Economic Conference), and 1937.

distinct from Great Britain, established beyond equivocation. This did not come until the second world war, though South Africa and Ireland had clarified their position more than the other Dominions. Being without a power of control over British policy, and yet without a fully recognized independence from the consequences of that policy, the Dominions were left during the inter-war armistice with many marks of subordination not found in the other states members of the world community. Great Britain, of course, suffered none of these limitations on her sovereignty.

This subordination was more noticeable prior to the adoption of the Statute of Westminster in 1931. Colonial status lingered on into the era of Dominion status. For example, in 1924, the year after Canada had for the first time negotiated a treaty wholly by herself,[6] the Treaty of Lausanne was made by Great Britain with Turkey on behalf of the whole Empire. Thus peace between Turkey and all the Dominions was arranged without any of the latter's representatives playing any part in the proceedings. So, too, appeals from Dominion courts continued, with few exceptions, to go to a supreme tribunal in England—the Judicial Committee of the Privy Council. All legislation for the Dominions emanating from the Imperial Legislature was legally valid regardless of their consent. Thus there was an executive, judicial, and legislative sovereignty over the whole Empire vested in British organs of government containing no representation from the Dominions. None of this sovereignty was in fact exercised against the will of the Dominions, but this natural restraint, based on common understanding, did not alter the legal relationship. The idea of the Dominions as nation states was fast crystallizing, and found formulation in the Imperial Conference Declaration of 1926, but had not yet modified the formal law.

Other indications of the semi-autonomous position of the Dominions were very evident. The diplomatic unity of the Empire had only just begun to break down before 1931, and the few Dominion representatives abroad stood out as exceptions to the general rule that foreign affairs were conducted for the whole Empire through the British Foreign Office. The refusal of members of the Commonwealth (except Ireland) to register their inter-se treaties with the League or to submit their own disputes to international arbitration, like their refusal to bring imperial preferences within the scope of most-favoured-nations clauses in commercial treaties, was based on the notion that they were not separate states but members of a single political entity. None of the Dominions was considered to have any separate right to neutrality once Great Britain declared war.[7] It was therefore impossible to rank the Dominions on the same plane as fully self-governing countries like Mexico or Sweden. Writing in 1929, Mr. Noel Baker declared that "it is impossible to admit that the Dominions are persons of International Law of identically the

[6] The Halibut Fishery Treaty with the United States.

[7] See speech of Premier King in Canadian House of Commons, June 9, 1924: cited in A. B. Keith, Speeches and Documents of the British Dominions, 1901–1934, p. 337.

same kind as those which are called fully "independent sovereign states." [8] Not being sovereign states, they were not equal to Great Britain and the term "Dominion status" well expressed this difference.

This situation was, of course, greatly changed by the Statute of Westminster in 1931. But there was at first no certainty as to just what had been accomplished. By Section 1 of the Statute the legal title of Canada, Australia, South Africa, the Irish Free State, New Zealand, and Newfoundland was belatedly advanced from that of "colony" to "Dominion" but, as we have seen, this latter term had long been in use already and had co-existed with dependency. The remainder of the Statute did not apply immediately to Australia, New Zealand and Newfoundland, since their Parliaments had to adopt it before it became operative in their territories. Hence their former subordinate position remained after 1931, no less real because it was henceforth removable. Further definite constitutional steps had to be taken by them before the alteration in their status could be measured, and none of the three took these steps in the inter-war period. Canada, South Africa, and the Irish Free State were immediately affected by the statute. The extent of the effect was a matter of debate.

The most important parts of the Statute of Westminster were those which (1) gave permission to the Dominions to amend or repeal in the future any Imperial laws extending to them, and (2) declared that henceforth no Imperial law would be deemed to extend to a Dominion unless it was expressly declared in the law that the Dominion had consented to its enactment. The first provision, on a strict and traditional interpretation, was a mere extension of existing authority rather than an irrevocable transfer of sovereignty, and the second was a self-denying ordinance establishing a rule of construction rather than a binding restriction on the future powers of the Imperial legislature. Hence the Statute of Westminster could be, and was, interpreted by many authorities as not affecting the previous indivisibility of the Crown or diminishing the legal sovereignty of the Parliament which enacted it. And the very fact that it emanated from the Imperial Parliament only, and was not, as it might have been, simultaneously enacted by all the Parliaments in the Commonwealth, prevented it from symbolizing clearly the equality it purported to establish.[9] For the Imperial Parliament, representing the citizens of the British Isles alone, cannot be a true constituent assembly for the entire Commonwealth. It is legally capable of legislating for colonies and Dominions, because of its continuing possession of an ancient sovereign

[8] The British Dominions in International Law, p. 356. In the Commonwealth independence of action should be distinguished from independence of association. The members can be completely free to act as they wish and still be associated, like the members of the Pan-American Union. See John P. Humphrey, The Inter-American System, Toronto, 1942, pp. 269–270.

[9] The Dominion Parliaments all approved the Statute in advance by resolution, thus indicating consent to the enactment. But the Statute itself came from the Imperial legislature only.

authority, but politically it is without representation from the other members of the group and hence lacks that democratic base which would be expected in any body possessing sovereignty over a Commonwealth composed of equals.

The Statute of Westminster was a necessary preliminary step if what remained of the legal dependency of the Dominions was to be ended. The Statute undoubtedly was an advance in the direction of legal equality, but of such a nature as to emphasize again, through its use of the Imperial Legislature only, the colonial element in Dominion status. Moreover the Statute of Westminster, as has been pointed out, did not at once apply to Australia, New Zealand, or Newfoundland, for the reason that under its provisions the Parliaments of these Dominions had to adopt it before it affected them, and down to the end of 1943 Australia alone had done this. These Dominions, therefore, remained under the old arrangements until they voted themselves into the new. Hence in August, 1939, the Imperial Parliament can be found legislating for Australia and New Zealand in an ordinary statute just as in the old days of Empire. The Emergency Powers (Defence) Act of that year[10] contained a clause designed to give Australian and New Zealand laws extraterritorial operation for certain purposes, and it was not felt necessary to declare that this had been done at the request of those Dominions. Moreover, the fact that Newfoundland is ranked as a Dominion under the Statute of Westminster shows that the title "Dominion" by itself gives no special international status, for Newfoundland was never a member of the League of Nations, had no ministers abroad, and could scarcely be considered a separate person in the international world. She soon lost what little autonomy she had, for in 1933 an Imperial Statute, passed with the consent of her legislature, put an end to her self-government and reduced her once again to the position of a Crown Colony. She is still a "Dominion" in name, however, so that she provides a clear example of the uselessness of this title as descriptive of a self-governing community.

It is what has been done by most of the Dominions since the Statute of Westminster, particularly under the stress of the present war, that has freed them so fully from former shackles as to make the term "Dominion status" now inappropriate for general use. South Africa and Ireland led the others in ridding themselves of the subordination implicit in the rank of Dominion, and established for themselves the doctrine of complete national independence. South Africa in 1934 took the imaginative step of re-enacting the Statute of Westminster in the Union Parliament so as to make it a South African statute as well as an Imperial one. In addition she changed the law relating to the functions of the Governor-General so as to make it possible for the Royal assent to be given in South Africa to every kind of state act.[11] No further reference to Westminster need be made under these laws

[10] *1939 Statutes (Imperial), cap.* 62, sec. 5.

[11] See the *Status of the Union Act* and the *Royal Executive Functions and Seals Act, Statutes of South Africa, 1934,* Nos. 69–70.

for anything the South Africans wish to do as regards their internal or external affairs and the status of South Africa as a "sovereign independent state" (not Dominion) was openly proclaimed.[12] Ireland went even further to eliminate the symbols of a colonial past from her constitution. The Statute of Westminster had freed her from any restrictions imposed by the Treaty with Britain of 1921. In 1931 she acquired a Great Seal for her own use on international documents, and in the new constitution of 1937 not only did she proclaim herself a sovereign and independent state but changes were made by which the Crown was entirely removed from the internal government and constitution of the country. Only in external affairs does she still use the Crown for certain purposes such as diplomatic appointments and international agreements. Both South Africa and Ireland also adopted their own flag. Yet neither, it must be pointed out, seceded from the British Commonwealth and both continued quite properly to be classed as nations that were in some degree "freely associated" with the other states in the Commonwealth group. What they did was to take steps *in their own Parliaments* to convert equality of status into equality of sovereignty and to establish the principle that constitutional authority in their countries no longer derived in any way from the former Imperial source but from their own people (or—in Ireland—from God). They decided to "sever their law from the Imperial root." [13]

Canada, Australia, and New Zealand, on the other hand, did not develop the theory of equality so dramatically or so extensively after 1931. None of them adopted a new national flag. In each the constitution remained as before, an Imperial statute, and no attempt was made to base it on the national law. Since Australia and New Zealand did not adopt the Statute of Westminster it was highly doubtful whether they even had the power possessed by all self-governing states to make laws with extra-territorial effect; hence the need for supplementary Imperial legislation in 1939. Canada suffered an actual loss of capacity to fulfil international obligations in 1937 when the British Privy Council, Canada's final court of Appeal, ruled that purely Canadian treaties made by the Canadian executive did not come as completely within the jurisdiction of the Canadian Parliament as treaties made by the Imperial executive on behalf of the whole Empire [14]—thus making it much more difficult for her to utilize some of the "status" acquired since 1919.

During the visit of the King and Queen to Canada in 1939 much emphasis was placed on the fact that the King sat in the Canadian Parliament and gave his assent to nine bills personally instead of through his representative,

[12] In the preamble to the *Status of the Union Act.*

[13] The phrase is borrowed from R. T. E. Latham's chapter on "The Law and the Commonwealth," in Hancock, Survey of British Commonwealth Affairs, Vol. I, at p. 526.

[14] See *A. G. for Canada* v. *A. G. for Ontario*, 1937 Appeal Cases, 326, and comments thereon in the Canadian Bar Review, June 1937.

the Governor-General. This symbolism, from one point of view, suggested the Canadianization of the Crown, if the term may be used. It exemplified the declaration already made, in the Imperial Conference of 1926, that the representative of the Crown in a Dominion holds "in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain." On the other hand, the presence of a British King in Canada symbolized that Canada was "British" and part of a single political entity. Earlier in the same session of Parliament which enjoyed the Royal presence Mr. MacKenzie King had refused to accept a Bill introduced by Mr. Thorson designed to clear up the great confusion regarding Canada's right to neutrality,[15] and Mr. Lapointe, the Minister of Justice, had outlined the various reasons why Canada did not have the legal power to be neutral in a war involving Great Britain. These two events were as much evidence of dependency as the royal presence was of sovereignty. Of more practical use in establishing full freedom of action by Canada was the adoption of a new Seals Act, giving Ottawa increased control over the various seals to be used on royal instruments. But, unlike the South African Act which it resembles in many respects, the Canadian Seals Act has no provision for using the Governor General's signature in an emergency in lieu of the Royal signature, and is thus incomplete.[16]

A crucial test of the theory of equality of status in the British Commonwealth was bound to turn on the right of the Dominions to separate action in time of war. Only if they had the same power as Great Britain to decide whether or not they would enter a war could it be said they were in any real sense her equals in international status. Ever since their territories had become part of the British Empire they had followed the parent state automatically in and out of wars. While the right of colonies to decide the extent of contribution in men and materials was well accepted before 1931, there was no colonial control whatever over (1) Imperial policy which led to war or (2) the declaration of war which resulted in the legal commitment to the status of belligerent. The obligations and the law of Empire included unity in face of Britain's enemies, and the colonies did not select the enemies.

The question was academically debated in the 1930's whether "Dominion status" in this regard was changed by the Statute of Westminster. Responsible leaders in Ireland and South Africa could produce good reasons for saying that their countries possessed the sovereign power of neutrality. The Irish constitution, like that of the United States, requires the consent of the legislature to a declaration of war and the South African legislation of 1934 stood as proof of nationhood, though the issue was complicated by the agree-

[15] Text of the Bill is in F. H. Soward and others, Canada in World Affairs: The Pre-War Years, p. 286.

[16] *Statutes of Canada, 1939, cap.* 22. Text and comment is in F. H. Soward, *op. cit.*, pp. 257, 329.

ment to allow the British fleet the use of Simonstown. Hence when Ireland decided to remain neutral in September 1939 the position—though not the policy—was accepted on all sides, and no one felt that secession from the Commonwealth had occurred. So, too, it is probable that South Africa's neutrality would have been equally respected if Premier Hertzog's policy to that effect had not been defeated in the Union Parliament. South Africa issued her own separate declaration of war on September 6, and thus became the first British Dominion to exercise this new right.

Equally strong reasons pointed to the absence of the right to neutrality in Australia and New Zealand. They had not adopted the Statute of Westminster, and had never made an attempt either by domestic or international action to assert the right. Both these Dominions were so sure of their determination to stand beside Britain under any circumstances that they were indifferent to the element of subordination implicit in their position. Hence it is not surprising that on September 3, 1939, when Britain declared war on Germany, Mr. Menzies said to the people of Australia "it is my melancholy duty to announce officially that in consequence of Germany's persistence in her invasion of Poland, Britain has declared war and as a result Australia is at war also." [17] Australia was at war "as a result" of Britain's and not her own declaration. The same was true of New Zealand.[18] Neither country had a representative in Berlin. Unable to notify her enemy directly of the fact that she intended to make war, New Zealand requested the British Government to "take any steps that may be necessary to indicate to the German Government that His Majesty's Government in New Zealand associate themselves in this matter with the action taken by His Majesty's Government in the United Kingdom." South Africa and Ireland were the only Dominions which had direct representation in Berlin in 1939.

In Canada, too, the prevailing opinion at the outbreak of the war was that no neutrality was possible.[19] This was the expressed opinion of Mr. Ernest Lapointe, then Minister of Justice,[20] and a number of steps taken by the Canadian Cabinet between September 3 and September 10 (the respective dates of Great Britain's and Canada's declarations of war), such as the arrest of German nationals [21] and the prohibition of trade with

[17] "Constitutional authorities in Australia have on the whole considered that when the King is at war all his dominions are at war. There was, therefore, no declaration of war by Australia on Germany." Round Table, December 1939, p. 191.

[18] See Robert B. Stewart, "The British Commonwealth Goes to War," in The American Foreign Service Journal, Vol. 16, No. 12, December 1939, p. 645 ff. A New Zealand writer has however taken the view that his country declared war herself (F. L. W. Wood, New Zealand in Crisis, 1939, p. 30) but this seems untenable.

[19] See authorities listed in the present writer's Canada Today, 2nd ed., 1939, p. 131, n. 1.

[20] Speech of March 31, 1939, in *House of Commons Debates* for that date; the relevant portions are cited in F. H. Soward, *op. cit.*, pp. 300 ff.

[21] This action was protested in the local press by the German consul in Montreal, thus

the "enemy," clearly implied an automatic belligerency. Indeed the decision to issue a separate declaration of war was an afterthought in Canada; it was reached by Mr. King and his Cabinet some time after Parliament met on September 7, which was a week after the government had begun to take steps to put Canada on an active war footing. Pressure outside the Cabinet (particularly from the Imperialist group);[22] President Roosevelt's exception of Canada from the application of the Neutrality Act and the element of confusion regarding the exact legal position of Canada made it necessary to take seriously the constitutional issues which for so long had been treated by certain Canadians as "academic." A formal declaration of war alone could clarify the situation. This was issued separately for Canada by the Governor-General, after telegraphic approval had been given by the King in London, and a state of war with Germany was proclaimed as from 10 September, —not as from 3 September, the date of Britain's declaration. By this time Sir Neville Henderson, the British Ambassador to Germany, had of course left Berlin.

Thus September, 1939, revealed two things about the constitution of the Commonwealth. It showed that Dominion status was a term still applied to some Dominions which could be made belligerents by the mere action of the British government, in which they had no representation. This was the surviving colonialism. But it showed also that Dominion action could end and in some cases had ended, that situation. Ireland emerged with full recognition as an independent state. An Irish chargé d'affaires, with credentials standing in the name of George VI, continues in Berlin, and the German minister to Ireland has remained at his post throughout the war. South Africa also, it can scarcely be doubted, was making her own decision when she chose to declare her belligerency on September 6, and was not merely deciding the degree of her participation. In Canada, belligerency on September 3 was automatically accepted by most people, and apparently at first by the government (notwithstanding Mr. King's later speeches to the effect that Canada entered the war without prior commitment); but the separate declaration of war one week later was a new constitutional claim which announced to the world that the right of sovereign choice on this point was henceforth being assumed by the Canadian Government. In Australia and New Zealand there was obviously an acceptance of the fact of automatic belligerent status resulting from the British declaration. India clearly had no independent choice in the matter.

Hence Mr. Roosevelt's careful distinction between various parts of the

indicating his assumption that Canada was not automatically at war. A similar attitude appears to have been taken by the Consul-General in Ottawa: see F. H. Soward, *op. cit.*, p. 256.

[22] See E. P. Dean, "Canada at War", in Foreign Affairs, January 1940, at p. 297; Round Table, December 1939, at p. 177. The Imperialists wanted the Declaration so as to commit Canada irrevocably: its effect was to show the disappearance of the old legal commitment.

Commonwealth in his application of the Neutrality Act on September 5, 1939, was based on a sound knowledge of intra-imperial relations. The proclamation invoking the Act, as originally drafted for signature, treated the Commonwealth as a unit, for it referred generally to "The United Kingdom, the British Dominions beyond the seas, and India." All the Dominions were grouped together irrespective of their stand on the war or their constitutional position. This first draft assumed the legal unity of the Commonwealth and the indivisibility of status during war. The President with his own hand changed the proclamation to read "The United Kingdom, India, Australia, and New Zealand." He took care to name individually the countries to which the Act was to apply, and to leave out Ireland, South Africa, and Canada pending their separate decisions. The Neutrality Act was not in fact applied to South Africa till September 8th and to Canada till September 10th. Thus was international recognition given to the exercise of full independence in foreign policy by the Dominions who had asserted the claim to freedom of choice. In respect of Canada the President's attitude was more nationalist than that of the majority of Canadians, but it greatly assisted the taking of a positive stand on the issue.

Since September 1939 the practice of separate Dominion declarations of war has become more general. In most cases these have been timed to coincide very closely if not exactly with a British declaration of war, but this would be expected as part of a joint war strategy. Canada's declaration of war with Japan, however, dates from December 7, 1941, one day before either Britain or the United States declared war. Australia and New Zealand declared war on Japan on December 9, the Australian declaration being made retroactive to 5 p.m. on December 8 and the New Zealand declaration retroactive to 11 a.m. on December 8th. In this instance Australia made the "striking constitutional innovation" of declaring war herself after specific authorization from His Majesty,[23] thus bringing herself into line with Canadian and South African practice for the first time. Ireland has persevered in her neutrality throughout the new conflicts. These and other instances would seem clearly to establish that the power to make war and peace is now vested in the Dominions as fully as in any independent nations. For Canada the original purpose of the Thorson bill, which Mr. King would not accept when introduced into the Canadian Parliament in 1939, appears to have been achieved. Since Canada, South Africa, Australia, and Ireland have all exercised the right of defining their enemies, and since other nations have taken cognizance of the practice the legal power can no longer be denied to any Dominion. The common citizenship has not interfered with this freedom of choice. It is noteworthy, also, that Australia, New Zealand, and Canada have increased their diplomatic services since the war began. Canada has not only sent five new High Commissioners and six new Ministers abroad but has begun the establishment of Consulates as in Greenland,

[23] Round Table, March, 1942, pp. 337–338.

St. Pierre-Miquelon, and New York; she has also raised her Legation in Washington to the status of an Embassy.

With regard to several of the Dominions there undoubtedly still remain relics of Imperial sovereignty. New Zealand is still bound by Imperial legislation extending to herself since, until she adopts the Statute of Westminster, the Colonial Laws Validity Act of 1865 remains part of her law; and her power of extra-territorial legislation is dubious. Canada is freer, being able to legislate extra-territorially and to repeal or amend all Imperial laws affecting her except the British North America Act, which is her Constitution. Nevertheless Canada still must use the Imperial Parliament for the process of Constitutional amendment, and she still allows appeals in non-criminal matters to go to the Privy Council in London for final settlement.[24] Such remaining traces of colonialism, however, are now of minor importance in comparison with the international status evidenced by the declarations of war and by the whole range of independent action in international as well as domestic affairs. Except for New Zealand's failure to adopt the Statute of Westminster, they are negligible reminders of a past status, and are fully governed by the understanding that they will be removed whenever the Dominions desire to do away with them. It will also be conceded that New Zealand in practice is on an equal footing with the other independent nations of the Commonwealth. In so far as Canada resorts to the Imperial Parliament for amendments to her Constitution she is merely using an external authority as a rubber stamp to validate the changes which Ottawa has previously adopted by resolution of both Houses of Parliament.[25] For various political, sentimental and historical reasons, Canada, Australia, and New Zealand prefer for the time being to leave a small part of their machinery of government in Great Britain, just as they leave their King overseas. With the right to independent action in war and peace made clear, this symbolic remnant has ceased to indicate a diminution of statehood.

It thus appears correct to say that this war has brought to completion the evolution, well under way before September, 1939, of independent national status for the Dominions. The terms "Dominion," and "Dominion status," are obsolete as descriptions of inter-Commonwealth relationships, however much they may linger in the language of the law. New Zealand alone has the word "Dominion" as part of her official name; Australia is a Commonwealth, South Africa a Union, and Canada and Ireland are without supplementary title. If Dominion status ends, as it has, in national independence, the special terminology becomes merely confusing. South Africa's re-

[24] Canada's right to abolish the appeal has been upheld by the Supreme Court of Canada (*1940 Canada Supreme Court Reports, 49*) but the case was not carried to the Privy Council itself and hence the issue is undecided.

[25] Wheare, *op. cit.*, p. 303 says: "The legal inequalities (remaining since the Statute of Westminster) were in the nature of voluntary restrictions imposed by the Dominions themselves upon the legislative competence of their Parliaments in much the same way as any community may choose to limit the powers of its legislature in its Constitution."

assertion of her international status as "an independent State," a phrase used by her in the Conciliation Treaty made with the United States and signed at Washington on April 2, 1940,[26] is further evidence of the change that has occurred, but ceases to mark her as being on a different footing from any of the other nations associated in the Commonwealth. All the Dominions (except Newfoundland) are independent states. The common kingship within the British group today establishes a form of personal union, the members of which are legally capable of following different international policies even in time of war. The relationship of England to Hanover after the accession of George I was very similar, though the analogy is not perfect since some of the Dominions, as already pointed out, have traces left of a closer relationship with Great Britain. The Commonwealth is thus no longer a group of subordinate minor powers under the sovereignty of one independent nation, but a group of six independent nations, of varying size, associated together for certain purposes and policies which any one may abandon at will but which most of them have chosen to keep parallel rather than divergent in major crises. The "sister kingdom" theory first suggested by the Canadian delegates to the London Conference in 1866,[27] has prevailed. Empire, in the true sense, exists in Great Britain only as regards India, Newfoundland, and the Colonies under her jurisdiction; it is already dissolved for the rest. The relationship between the independent states associated through the Commonwealth is not Imperial in form but international. Even the common citizenship does not compel uniformity of international action since most of the member states make a distinction in law between their own nationals and those from other parts of the Commonwealth. Irish law does not recognize the common nationality within its territory. The quality of British subject now confers no right of free movement within the Commonwealth; no exemption from deportation proceedings; no inalienable right of appeal; no right to vote; no obligation to bear arms unless his own state is at war. It does, however, provide a basis on which the member states can erect their own system of rights, and it entitles the bearer to the protection of the diplomatic representatives of the Crown wherever he may be.

CONCLUSIONS

This analysis of the present relations between the members of the British Commonwealth leads therefore to the following conclusions:

1. Dominion status, in all save minor detail, has evolved into complete national independence. As a term descriptive of the states members of the Commonwealth, the word "Dominion" is therefore obsolete and confusing.

[26] The text is in S. S. Jones and D. P. Myers, Documents on American Foreign Relations, Vol. III, 1940–1941, Boston, 1941, p. 387.

[27] See F. R. Scott, "Political Nationalism and Confederation," in Canadian Journal of Economics and Political Science, August 1942, p. 386, at 390–396.

It has never been applicable to Great Britain. It should be abandoned and Section 1 of the Statute of Westminster ought to be amended accordingly.

2. The "British Commonwealth of Nations" is not a state. It has no single personality either in international or municipal law and no single government capable of acting for the whole.[28] The name is merely a convenient way of referring to a particular association of nations—Great Britain, Canada, Ireland, South Africa, Australia, and New Zealand, and their respective dependencies. It belongs rather to the category of collective names as "the Pan-American Union" or the "The United Nations." The term "British Empire" should be restricted to Great Britain and her empire (India, the Colonies and Protectorates) in which case it refers to a specific entity in international law.

3. The independent nations in the Commonwealth are still "associated" together by reason of their use of the common Crown for certain purposes, by their retention of an underlying common nationality, and by a number of generally accepted modes of behaviour *vis-à-vis* one another. A nation outside the Commonwealth is no more independent than one inside, though it is free from the results of this association.

4. Since Dominion status has been transformed into national status any offer of "Dominion status" to a non-self-governing part of the Commonwealth (such as India) is impliedly an offer of complete independence of action. There is nothing now withheld in such a grant. The acceptance of the status would, however, imply a continued association with the other members of the Commonwealth, but only on terms defined by the member itself and terminable at its sole discretion.

5. The use of the common Crown is not an essential condition of membership in the Commonwealth. Ireland has abolished it as a part of her internal constitution. A republic could be associated with other monarchies if such were the agreement. The use of the Crown as a symbol of association does not restrict the freedom of action of the nation states within the Commonwealth, though it does sometimes confuse the citizens with regard to their primary allegiance.

6. The oath of allegiance of public officers in each of the member nations is an oath to the Crown in relation to and as part of the constitution of that nation. It is not an oath to the Crown generally and in every aspect. Hence it is not a violation of the oath of allegiance to urge the Crown to adopt any particular policy (*e.g.* belligerency or neutrality) *vis-à-vis* the nation of which the proponent is a citizen, even if the Crown adopts the opposite policy elsewhere. Treason can only be committed against the national crown.[29]

[28] See P. E. Corbett, "The Status of the British Commonwealth in International Law," in University of Toronto Law Journal, Vol.III, 1940, 348, 359.

[29] This point arose in Quebec in September 1939. A member of the Quebec Bar opposed Canada's participation in the war, and was accused by a Chief Justice of having violated

7. The practice of excluding members of the Commonwealth from the application of the most-favoured-nation clause in commercial treaties, originally justified on the ground that the members were not separate states, can no longer be so justified.

8. Any member of the Commonwealth may make whatever treaties, alliances, or unions it desires with any other non-British state. The offer by Great Britain of complete union with France in 1940 is an example of the freedom possessed by the individual members. There was no previous Commonwealth agreement on this action, no assent from the other members of the group. The union would not on this account have been illegal in any respect. Similarly, Canada's Joint Defence agreement with the United States of August, 1940, required no Commonwealth approval. Members of the Commonwealth, however, are by agreements of Imperial Conferences expected to inform one another of negotiations likely to be of mutual interest.

9. The High Commissioners representing the various members of the Commonwealth *vis-à-vis* each other should belong to the category of the diplomatic corps, and it would be logical to accord them this status. At present their rank is inferior to that of the ambassadors of the smallest states.[30]

10. Full independence of action, in war as in peace, is possessed by all members of the Commonwealth. The common underlying citizenship is no legal obstacle to partial belligerency in the Commonwealth group.

11. If all or some of the nations of the Commonwealth join any future world association of states it would be improper for them to refuse to apply the rules of that association to themselves in their relations with one another. Any claims to special right for the group or any reservations of Inter-Commonwealth disputes from the purview of the World Court would violate the general principle that all states should be equally subject to international law.

12. The British Commonwealth, being an association of states *sui generis*, offers to the world no model of international organisation. It is not a type on which a League of Nations can be built. It has been steadily applying to itself over the past century the principle of national sovereignty, which, if a new league or union of nations is to be established, must be reduced rather than extended. Its surviving unity is a remnant of a much greater unity and not the result of an effort toward a new and closer association. It has none of the common organs of government which a world society would

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his oath of allegiance by so doing—an accusation clearly unfounded unless Canada was still a dependent colony.

[30] This conclusion supports the opinion vainly urged by the Canadian Government at the time of the appointment of the first Canadian High Commissioner to London in 1880. See the correspondence in W. P. M. Kennedy, Status, Treaties and Documents of the Canadian Constitution, 2nd ed., Boston, 1930, at p. 676.

need, though it offers many examples of purely voluntary coöperation based on sympathy, tradition, and consent.

13. It would seem improper, at the peace conference which will follow this war, for the British nations to claim the same dual representation they possessed at Versailles in 1919, when, in addition to their representation as separate states, they also were granted representation on the British Empire panel. Each should be represented by its own plenipotentiaries on the same basis as all other states.

THE STATUS OF THE UNITED STATES FORCES IN ENGLISH LAW

By Egon Schwelb

It is proposed to deal in this article with the English law concerning the legal status of the United States forces present in the territory of the United Kingdom of Great Britain and Northern Ireland during the present war. The history of, and the controversies regarding, the legal position of friendly armed forces on foreign territory in international law remain outside of the scope of the present survey, which is devoted to the municipal aspect of the matter.[1] In order, however, to give a picture of the whole body of English law applicable to the American forces we shall include a few remarks on the development of the question in English municipal and British imperial law, and it will also be necessary to compare the provisions concerning the United States forces with those regulating the status of the other allied and associated forces at present stationed in the British Isles, as well as with the provisions regarding visiting Dominion troops. As will be seen later there has been a certain amount of interdependence between international and inter-imperial relations with regard to the legal problem with which we are concerned.

I. The Sources of English Law on the Subject

During the World War of 1914–1918 the legal position of allied troops present in the United Kingdom was regulated by Orders in Council made under the Defence of the Realm Acts. By Order in Council of March 22, 1918, Regulation 45F of the Defence of the Realm Regulations was issued and by Order in Council of June 25, 1918, it was amended.[2] In the first paragraph of this Regulation it was declared that, subject to any general or special agreement, the naval and military authorities and courts of an Ally may exercise in relation to the members of any force of that Ally who may for the time being be in the United Kingdom all such powers as are conferred on them by the law of that Ally. The Regulation contained detailed provisions

[1] See Colonel Archibald King, "Jurisdiction over Friendly Foreign Armed Forces," this Journal, Vol. 36 (1942), p. 539, *et seq.;* Professor Arthur L. Goodhart, "The Legal Aspect of the American Forces in Great Britain," American Bar Association Journal, November 1942, pp. 762–765; Dr. Roman Kuratowski, "International Law and the Naval, Military, and Air Force Courts of Foreign Governments in the United Kingdom," Transactions of the Grotius Society, Vol. XXVIII (1942), p. 1, *et seq.;* the present writer's, "The Jurisdiction over the Members of the Allied Forces in Great Britain," Czechoslovak Yearbook of International Law, London, 1942, p. 147, *et seq.*, and, for the War of 1914–1918, Aline Chalufour, *Le Statut Juridique des Troupes Alliés pendant la Guerre, 1914–1918.*

[2] S. R. & O., Nos. 367, 765; see "The Defence of the Realm Regulations Consolidated," being Part II of the Defence of the Realm Manual, 7th Edition, Revised to March 31, 1919.

regarding the assistance to be rendered to allied service courts by the British military and civil authorities, the privileges of such courts, witnesses heard before them, and regarding the execution of sentences imposed by them. Negotiations for a change of the status of the American soldiers to the effect that they should be subject to the exclusive jurisdiction of American military courts were in progress between the British and American Governments, but the negotiations were not completed.[3]

Apart from Regulation 45F of the Defence of the Realm Regulations the question of troops other than United Kingdom troops arose in English law for the first time as a question of intra-imperial relations as a consequence of the definition of Dominion status by law and convention at the Imperial Conferences of 1926 and 1930 and through the Statute of Westminster, 1931.[4] At the Imperial Conference of 1926 the question of the extra-territorial operation of Dominion legislation was referred to a committee.[5] The Committee in their report said: [6]

> "In connection with the exercise of extra-territorial legislative powers, we consider that provision should be made for the customary extra-territorial immunities with regard to internal discipline enjoyed by the armed forces of one Government when present in the territory of another Government with the consent of the latter. . . . We recommend that provision should be made by each member of the Commonwealth to give effect to such customary extra-territorial immunities within its territory as regards other members of the Commonwealth."

This recommendation was adopted by the Imperial Conference of 1930, and legislation in substantially identical terms has been passed in the Union of South Africa,[7] in the United Kingdom,[8] and in the Dominion of Canada.[9] An Act on similar lines was passed by the Newfoundland legislature in 1940.[10] The Commonwealth of Australia did not adopt the relevant sections of the Statute of Westminster until 1942; the Dominion of New Zealand has not adopted them at all.[11] Special provisions applying to Australian and New Zealand forces were, therefore, inserted by the Army and Air Force

[3] The Attorney-General Sir Donald Somervell, statement made on August 4, 1942, Parl. Deb., House of Commons, Vol. 382, col. 930.

[4] Imperial Conference, 1926, Summary of Proceedings, Cmd. 2768; Imperial Conference, 1930, Summary of Proceedings, Cmd. 3717; The Statute of Westminster, 1931, (22 Geo. 5, c. 4).

[5] Cmd. 2768, at p. 12 and 18.

[6] Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929 (Cmd. 3479, 1930), par. 44.

[7] Union of South Africa: Act No. 32 of 1932; The Defence Act (Amendment) and Dominion Forces Act, 1932. Chapter II: The Discipline and Internal Administration of Visiting Dominion Forces, Sections 6–11.

[8] Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. 5, c. 6).

[9] Dominion of Canada: The Visiting Forces (British Commonwealth) Act, 1933 (23–24 Geo. V, c. 21).

[10] Newfoundland: The Visiting Forces (British Commonwealth) Act; No. 29, 1940.

[11] Sec. 11 of the Statute of Westminster.

(Annual) Act, 1932,[12] in Sections 177 and 187C of the Army Act and of the Air Force Act and expressly maintained in force by Section 7 of the Visiting Forces (British Commonwealth) Act, 1933.

The British Statute, which will be called the Commonwealth Act hereafter, though enacted later than the South African Act, served as a model for Dominion legislation.[13] The Commonwealth Act not only served as a model for Dominion legislation on the subject; in the present war, as will be seen later, part of it was applied, with certain adaptations, modifications, and exceptions, to the allied and associated forces of the European countries as well as to the United States forces. The Report of the Conference on the Operation of Dominion Legislation,[14] in recommending provisions for the settlement of relations among the different members of the British Commonwealth of Nations, referred to the "customary extra-territorial immunities" enjoyed by foreign friendly forces in International law, and in the debates on the Commonwealth Bill the then Solicitor General, Sir Boyd Merriman,[15] and the then Financial Secretary to the War Office, Mr. Duff Cooper,[16] similarly referred to the precedent which consisted in the emergency legislation passed under the Defence of the Realm Act during the First World War. The legislative structure thus established for intra-imperial relations was made use of in regulating the status of foreign troops which came to the United Kingdom during the present war.

This was effected by the Allied Forces Act, 1940,[17] Sec. 1[3] of which provides that His Majesty may by Order in Council provide for the application to any allied force for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft, of certain sections of the Commonwealth Act of 1933 but subject to such adaptations, modifications, and exceptions as may be provided by the Order. Under this enabling clause part of the provisions of the Commonwealth Act have been applied to the different Powers with whom Britain is allied and who maintain armed forces in the United Kingdom. The application was effected by the following Orders in Council:

(1) By Order of October 11, 1940,[18] to Belgium, the Czechoslovak Republic, the Netherlands, Norway, and Poland;
(2) By Order of January 15, 1941,[19] to the Free French Forces, now called Fighting French Forces;

[12] 22 Geo. 5, c. 22. Through Section 9 of the Army and Air Force (Annual) Act, 1943, the Commonwealth of Australia has been excluded from Sec. 187C of the Army Act and Sec. 187C of the Air Force Act because those sections are no longer required for Australia, Australia having now adopted the relevant provisions of the Statute of Westminster.

[13] The Under-Secretary of State for War Earl Stanhope, October 25, 1932, Parl. Deb., House of Lords, Vol. 85, col. 807.

[14] *Supra*, note 6 (Cmd. 3479).

[15] February 13, 1933, Parl. Deb., Lords, Vol. 274, col. 746.

[16] *Ibid.*, col. 734.

[17] 3 & 4 Geo. 6, c. 51.

[18] Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940; S. R. & O., 1940, No. 1818.

[19] Allied Forces (Application of 23 Geo. 5, c. 6) (No. 2) Order, 1941; S. R. & O., 1941, No. 47.

(3) By Order of May 5, 1941,[20] to Greece and Yugoslavia;
(4) By Order of May 22, 1942,[21] to the United States of America.

In applying part of the provisions of the Commonwealth Act to the different allied and associated forces the King in Council (in other words the Government) made use of his power to adapt, to modify, and to provide for exceptions from, them, with the effect that the Commonwealth Act applies in partly different wordings to the Dominion forces, to the allied forces other than U.S.A., to the Fighting French Forces, and to the forces of the United States. Certain sections have been considerably recast in the Act as applied to the United States forces and differ in wording and content from the analogous sections as applied to other groups of Dominion and allied forces.

It will be seen from the foregoing survey that when, shortly after Pearl Harbour, the first American troops arrived in the British Isles English municipal law had already provided for a statutory basis for their military and naval courts and authorities to exercise within the United Kingdom all such powers as are conferred upon them by the law of the United States, such statutory basis being provided by Sec. 1[1] of the Allied Forces Act and those provisions of the Commonwealth Act which were applicable and eventually applied to the American Forces. The Allied Forces Act automatically applied to the American forces when the first American contingent reached the British Isles. To effect this no special treaty or agreement between the British and American governments was required. The opposite view does not seem to be warranted either by the provisions of the statute or the actual practice followed by the British Government.

Some of the provisions of the Allied Forces Act, 1940, however, did not seem to the United States authorities adequate[22] and "after considerable discussion"[23] special legislation was passed "to give effect to an agreement recorded in Notes exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America, relating to jurisdiction over members of the military and naval forces of the United States of America," i.e. the United States of America (Visiting Forces) Act, 1942,[24] to be cited as American Forces Act hereafter. In introducing

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After the recognition of the French Committee of National Liberation the Orders subjecting the "Free French Forces" to a special regime different from the status of the forces of the sovereign allied Powers (Sec. 1[2] of the Allied Forces Act) have been revoked and the French forces under the authority of the Algiers Committee have been placed in the same legal position as the forces of the other allied Powers. In the Order in Council S. R. & O., 1940, No. 1818, which enumerates the "Powers allied with His Majesty," "the Republic of France" has been added to the list of allied Powers: Orders in Council of September 24, 1943; S. R. & O., 1943; Nos. 1379–1381.

[20] The Allied Forces (Greece and Yugoslavia) Order, 1941; S. R. & O., 1941, No. 651.

[21] The United States of America (Visiting Forces) Order, 1942; S. R. & O., 1942, No. 966.

[22] For criticism see King, *op. cit.*, p. 557.

[23] *Ibid.*

[24] 3 & 4 Geo. 6, c. 51.

the Bill in the British House of Commons, the Home Secretary, Mr. Herbert Morrison, said [25]: "It is the considered opinion of the Government of the United States that it is most expedient, and from their constitutional point of view is right, that any offences on the part of the American Armed Forces should be tried by their own military courts and not by British courts. The American authorities have pressed that point of view upon us with great vigour and earnestness."

Both the Commonwealth Act as applied to the United States forces (Sec. 5), and the American Forces Act itself (Sec. 3) provide for the extension of their provisions to British colonies, protectorates and mandated territories. The British Government have availed themselves of these enabling provisions by two Orders in Council [26] and the statutes have been applied to United States forces present in the British dependencies set out in Schedules to both Orders. The dependencies enumerated in these Schedules differ somewhat from the analogous Schedules determining the validity in the British dependencies of the United Kingdom provisions regarding Dominion forces [27] and the forces of the non-American allies,[28] the chief difference being that the Allied Forces Act, the Commonwealth Act, and the United States Act do not apply to American forces in such British colonies as are, and to the extent they are, leased to the United States of America under the American British Agreement of March 27, 1941.[29] For the leased bases the provisions of the said Agreement are in force to the exclusion of those of the American-British Agreement of July, 1942 (par. 9), and of the American Forces Act. The provisions of the Leased Bases Agreement were given municipal effect by enactments of the different local legislatures.[30]

The legal status of American troops in British Dominions is no concern of the United Kingdom legislature.[31]

The procedure of summoning witnesses to American service courts was

[25] Parl. Deb., Commons, Vol. 382, cols. 876/877 (August 4, 1942).

[26] The United States of America (Visiting Forces) (Colonies, &c.) Order, 1942; S. R. & O., 1942, No. 1576, and The United States of America (Application of 5 and 6 Geo. 6, c. 31 to Colonies, etc.) Order, 1942; S. R. & O., 1942, No. 2410.

[27] The Visiting Forces (British Commonwealth) (Application to the Colonies, &c.) Order in Council, 1940; S. R. & O., 1940, No. 1373, as amended by The Visiting Forces (British Commonwealth) (Application to Colonies, etc.) Order in Council, 1942; S. R. & O., 1942, No. 1905.

[28] The Allied Forces (Application of Acts to Colonies, &c.) (No. 1 and No. 2) Orders, 1941; S. R. & O., 1941, Nos. 155 and 1102.

[29] Cmd. 6259; this JOURNAL, Vol. 35 (1941), Supp., p. 136.

[30] In Newfoundland by the American Bases Act, No. 12, 1941; in Trinidad by the United States Bases (Temporary Provisions) Ordinance, No. 37, 1941; in Jamaica by the United States Bases (Agreement) Law, 1941, No. 76, in Bermuda through different enactments of 1940 and 1941 etc.

[31] King, *op. cit.*, p. 556.

regulated by an order of the Army Council and Air Council [32] and an order made by the Admiralty.[33]

Further, under the Emergency Powers (Defence) Acts, 1939 and 1940, the Defence (United States Forces—Administration of Estates) Regulations, 1942, were issued.[34]

By Order in Council [35] Regulation 104A of the Defence (General) Regulations was inserted applying the provisions of a considerable number of Defence Regulations to allied powers and associated authorities, to persons in their service and to their property.

It may be added that the legislation so far mentioned is in no way concerned with the enforcement of calling-up notices of Allied Governments. In the debate on the Allied Forces Bill Sir Edward Grigg, Under-Secretary of State for War, stated that conscription of foreigners was in no way implicit in this Bill. But he declared the Government's readiness to introduce the necessary legislation if the Allied Governments should want to apply and enforce the conscription of their subjects for military service.[36] On September 18, 1940, Mr. Attlee declared on behalf of the United Kingdom Government that they intended in due course to submit to Parliament legislation to confer upon the Allied Governments in Great Britain the necessary authority to call up their nationals for military service in accordance with their existing national laws. "Until this legislation has been passed the position remains that the Allied Governments have the right to call upon their nationals in this country for military service in accordance with their own national laws, but our own courts and authorities have no power to assist the Allied Governments in enforcing such obligations for military service upon any of their nationals who may be unwilling to respond voluntarily." [37] This declaration was repeated by Mr. Attlee on December 3, 1940,[38] on August 5, 1941 [39] and, by the Under-Secretary of Labour, Mr. Assheton, on December 10, 1941.[40] The National Service (No. 2) Act, 1941, passed in December, 1941, contains, under the heading "General obligation to serve," the declaration that "all persons of either sex for the time being in Great Britain are liable to national service, whether

[32] Orders made by the Army Council and Air Council under Paragraph 2 [3] of the Schedule to the United States of America (Visiting Forces) Order, 1942; S. R. & O., 1942, No. 1679.

[33] Order, dated October 21, 1942, made by the Admiralty under Paragraph 2 [3] of the Schedule to the United States of America (Visiting Forces) Order, 1942; S. R. & O., 1942, No. 2192.

[34] The Defence (United States Forces—Administration of Estates) Regulations, 1942; S. R. & O., 1942, No. 2562.

[35] S. R. & O., 1942, No. 2561.

[36] Parl. Deb., Commons, Vol. 364, cols. 1384–5 (August 21, 1940).

[37] *Ibid.*, Vol. 365, col. 149 (September 18, 1940).

[38] *Ibid.*, Vol. 367, col. 411 (December 3, 1940).

[39] *Ibid.*, Vol. 373, col. 1785 (August 5, 1941).

[40] *Ibid.*, Vol. 376, col. 1605 (December 10, 1941).

under the Crown or not, and whether in the armed forces of the Crown, in civil defence, in industry, or otherwise," [41] but a Bill actually imposing the liability to military service upon Allied nationals was laid before Parliament as late as June, 1942, and became law as the Allied Powers (War Service) Act, 1942.[42] This Act, the detailed analysis of which is outside the scope of this survey [43] is based on the principle that such Allied nationals as are not within a certain time members of the forces of their own state, are liable for service in the British forces. The substantial section of the Act is an enabling measure which will not in general come into force with regard to any particular nationality, until, in agreement with the Allied nationality concerned an Order in Council is made applying it to persons of that nationality.[44]

The Allied Powers (War Service) Order, 1943,[45] applying the liability for war service to male nationals of Belgium, the Czechoslovak Republic, Greece, the Netherlands, Norway, Poland, and Yugoslavia came into operation on April 1, 1943. The Allied Powers (War Service) Act, 1942, has so far not been applied to the United States.[46]

II. The Fundamental British Provisions regarding American Military Jurisdiction

Sec. 1[1] of the Allied Forces Act provides that "where any naval, military or air forces of any foreign Power allied with His Majesty are for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft, the naval, military and air force courts and authorities of that Power may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power." This provision has been criticized by Colonel Archibald King [47] on account of the words "subject to the provisions of this Act" which—together with Sections

[41] 5 & 6 Geo. 6, c. 4, Sec. 1. [42] 5 & 6 Geo. 6, c. 29.

[43] See the note by Pavel Hartmann, in 6 Modern Law Review (1942–43), p. 72.

[44] The Joint Parliamentary Secretary to the Ministry of Labour (Mr. McCorquodale), Parl. Deb., Commons, Vol. 380, col. 2178 (June 25, 1942).

[45] The Allied Powers (War Service) Order, 1943, S. R. & O., 1943, No. 381.

[46] With regard to similar arrangements during the War 1914–1918 see the Military Service (Conventions with Allied States) Act, 1917, 7 & 8 Geo. 5, Ch. 26, and the Conventions made under it by the United Kingdom with France (Agreement of October 4, 1917: Cmd. 8691; and Order in Councils: S. R. & O., 1917, No. 1216), Russia (Agreement of July 16, 1917: Cmd. 8588, and Order in Council: S. R. & O., 1917, No. 871), Italy (Agreement of December 11, 1917: Cmd. 8694; and Order in Council: S. R. & O., 1918, No. 52), Greece (Convention of August 8, 1918: Cmd. 9103; and Order in Council: S. R. & O., 1918, No. 1225), and the United States of America (Convention of June 3, 1918: Cmd. 9101; and Order in Council: S. R. & O., 1918, No. 1105). See further W. W. Fitzhugh and C. C. Hyde, The Drafting of Neutral Aliens by the United States, this Journal, Vol. 36 (1942), p. 369 *et seq.*

[47] *Op. cit.*, p. 557.

2[2] and 2[3]—show "that it is the theory of the Allied Forces Act that foreign courts operate in Britain by authority of that Act, that it is a delegation of power to them. This view is believed to be unsound. The courts-martial of the armed forces of any nation derive each and all their powers from the laws of that nation, and can accept no grant of power from any other." The British Government, in introducing the Allied Powers Bill, was indeed acting upon the "theory" stated by Col. King. This follows both from a comparison of the text of the Allied Forces Act with Defence Regulation 45F which had been in force during the First World War, [48] and from express statements of Government spokesmen in Parliament. Regulation 45F did not claim to grant to the Allied authorities any powers, but "for facilitating the enforcement by His Majesty's Allies of discipline amongst . . . their . . . forces" declared that "the authorities and courts of an Ally may exercise . . . powers . . . conferred on them by the law of that Ally." In the debate on the Allied Forces Bill the then Under-Secretary of State for War Sir Edward Grigg stated that the British Government "are engaged in negotiating agreements with these different Sovereign Governments, and we shall not be able to complete them until we have the legal power which this Bill will confer." And he went on to say that "actually, those Governments are not in proper command of their own forces until this Bill becomes law." [49] In another connection Sir Edward Grigg, in answering a question relating to Prince Starhemberg, then a member of the Free French Air Force, said: "I am not in a position to make any statement upon the membership of a force that has no legal status. It can be joined like any other club, since this is a free country. But when these forces have some legal status, then will be the moment to raise questions of this kind." [50] On February 20, 1941, the then Under-Secretary of State for Foreign Affairs, Mr. Butler, moved the Second Reading of the Diplomatic Privileges (Extension) Bill and mentioned the Allied Forces Act in the following way: "The House has already passed the Allied Forces Act, which confers [*sic*] on the Governments concerned power over their own nationals in respect of those forces which are so gallantly massed on our shores." [51] According to the views expressed by Sir Edward Grigg and Mr. Butler it is the Allied Forces Act from which the Allied forces derive their legal existence and the Allied authorities and courts their jurisdiction over their members.

It is submitted, however, that though the draftsmen of the statute were no doubt influenced by what Col. King describes as "the theory of the Allied Forces Act," this theory has not been consistently upheld even by the Act itself. In spite of what has been said the Allied Forces Act does not deny that the Allied service courts derive their authority from the laws of their own countries and the Act makes express provision for the Allied service courts and authorities to exercise all such powers as are conferred upon them

[48] *Supra*, note 2.
[49] Parl. Deb., Commons, Vol. 364, col. 1389 (August 21, 1940).
[50] *Ibid.*, col. 1400.
[51] *Ibid.*, Vol. 369, col. 330 (February 20, 1941).

by the law of that Power to which they belong, i.e. the Act itself contains a reference to the law of the respective country.

No British statute can confer upon American or Dutch or Norwegian, etc., service courts powers to try and convict American, Dutch, or Norwegian soldiers under American, Dutch, or Norwegian law. On the other hand, no American, Dutch, or Norwegian statute can confer on American, Dutch, or Norwegian service courts the right to sit on British territory, to examine witnesses, to be protected against contempt of court and to enjoy such other privileges as belong to a military tribunal, nor can it secure for such courts the help of the British police or any other authority. Only British legislature can make the activities of such courts lawful in respect of the British legal order and provide the necessary protection and assistance for them.

The point, therefore, is not whether the British legislator claims to be granting powers to foreign service courts, but in the extent of such powers, i.e. whether or not the powers which foreign service courts are entitled to wield under the Allied Forces Act are equivalent to the rights accorded to friendly armed forces by international law. The answer to this question is outside the scope of this paper, the purpose of which is to describe the positive municipal law of the United Kingdom.

It should be observed that the much wider powers under the British-American Agreement of July 27, 1942, and under the American Forces Act are, as far as British municipal law is concerned, also exercised under provisions enacted by the British Parliament. On the other hand, not only the United States, but all other allied Powers maintaining armed forces on British soil, claim that their courts-martial derive their powers from their own laws and they do so in spite of the fact that the Allied Forces Act applies to their forces without the modifications introduced by the special legislation in respect of the American forces. This special legislation has not altered Sec. 1[1] of the Allied Forces Act and it applies to the American forces in the wording cited above in the same way as to all other Allied forces. But the view that it is the law of the United States and by no means British law from which the American courts-martial in Great Britain and Northern Ireland derive their powers, and that the United States cannot accept a grant of power from any other legal order, has found recognition even in the express wording of British municipal provisions: Sec. 1[2] of the Commonwealth Act of 1933, in dealing with the immunities and privileges of the service courts of the British Dominions, speaks of service courts "exercising jurisdiction by virtue of this Act." When this provision was extended to the Allied forces other than American [52] and to the Free French Forces,[53] the quoted words in Sec. 1[2] of the Commonwealth Act were replaced by the words "exercising jurisdiction by virtue of the Allied Forces Act, 1940." In the Schedule to the Order in Council, applying the Commonwealth Act of 1933 to the United States forces,[54] the text runs as follows: "The members of any service court

[52] S. R. & O., 1940, No. 1818. [53] *Ibid.*, 1941, No. 47. [54] *Ibid.*, 1942, No. 966.

of the United States of America exercising within the United Kingdom . . . in relation to members of the American forces, jurisdiction conferred by the law of the United States of America. . . ."

In our view the difference in wording does not involve different legal consequences. The text as applicable to forces other than American forces takes as its starting point the British legal order and accordingly stresses the fact that it is the British legal order into which the provision is embodied. The text, as applied to the American forces accepts the American starting point. The difference is not one of substantive law, but rather, as it were, one in the degree of international courtesy.

The Commonwealth Act does not exempt the members of the visiting Dominion force from the local (United Kingdom) jurisdiction.[55] With regard to the allied forces, subjection to the jurisdiction of the British courts is expressly stated in Sec. 2[1] of the Allied Forces Act, which reads:

> "Nothing in the foregoing section shall affect the jurisdiction of any civil court of the United Kingdom . . . to try a member of any of the . . . forces . . . for any act or omission constituting an offence against the law of the United Kingdom. . . ."

"Although under Clause 2 we do claim complete jurisdiction over all offences," said the British Attorney General Sir Donald Somervell in the debate on the Allied Forces Bill,[56] "in practice it is not, of course, claimed where an offence is committed within the lines and the life or property of one of our subjects is not involved." Under Sec. 2[3] an Allied service court has no jurisdiction to try any person for any act or omission constituting an offence for which he has been acquitted or convicted by any United Kingdom civil court.

It was these substantive provisions of the Allied Forces Act which have been abrogated in respect of the American forces by the American Forces Act. By virtue of Sec. 1[1] of this Act no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America. Mr. Herbert Morrison, in moving the Second Reading of the Bill in the British House of Commons [57] described the position in this way: "The present position is that there is a dual jurisdiction. At the moment (i.e.,

[55] But the Visiting Forces (Royal Canadian Air Force) Order, 1942, S. R. & O., 1942, No. 2568, provides that no officer or airman of the Royal Canadian Air Force who is attached temporarily to the Royal Air Force shall, on conviction by court-martial, be liable to suffer death, penal servitude, imprisonment with or without hard labour and (in the case of an officer) cashiering or dismissal unless the infliction of such punishment is approved by the Governor General of Canada in Council.

Provisions to the like effect concerning Australia are contained in The Visiting Forces (Royal Australian Air Force) Order, 1943, S. R. & O., 1943, No. 750. Cf. also The Visiting Forces (Military Courts-Martial) Order, 1942, S. R. & O., 1942, No. 270.

[56] Parl. Deb., Commons, Vol. 364, col. 1405 (August 21, 1940).

[57] *Ibid.*, Vol. 382, col. 878 (August 4, 1942).

before the passing of the Act) the American armed forces, through their appropriate military courts and so on, have jurisdiction over those cases and so have the British courts of justice. What this Bill does is to oust the British courts of justice from cases in criminal offences." In the British Foreign Secretary's note, which, together with the American Ambassador's note is appended to the United States Act, Mr. Eden says that the British Government ". . . are prepared, subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the service courts and authorities of the United States Forces should . . . exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces. . . ." "It is appreciated, however," the note continues, "that cases may arise where for particular reasons the American authorities may prefer that their courts should not exercise the above jurisdiction, and His Majesty's Government would accordingly propose that in any case in which a written communication to that effect is received from the Diplomatic Representative of the United States it should be open to the appropriate British authority to restore the jurisdiction of the courts of the United Kingdom to deal with that case." Mr. Winant having informed Mr. Eden that his "Government agreed to the several understandings which were raised" in Mr. Eden's note, the proviso was inserted in Sec. 1[1] of the Act that "upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a (sc. British) Secretary of State may by order direct that the provisions of this subsection (i.e. the ousting of British jurisdiction) shall not apply in that case." It is intended that such waiver of the exclusive American jurisdiction might take place in the case of an offence committed in a distant part of the United Kingdom where it would be needlessly troublesome for the American authorities to send a court-martial. The American Government has affirmed its understanding that "the trial of any member of the United States Forces for an offence against a member of the civilian population . . . would be arranged to take place . . . within a reasonable distance from the spot where the offence was alleged to have been committed, so that witnesses should not be required to travel great distances to attend the hearing"[58] Lord Atkin has pointed out [59] that this provision is not made part of the Act.[60]

Thus a waiver of American jurisdiction is provided for both in the British-American Agreement of July 27, 1942, and in the British statute. A similar waiver, though of much wider scope and of a general nature, is contained in the military agreements between Britain and her European Allies who, it appears, have agreed to the fundamental provisions of the Allied Forces Act regarding concurrent British civil and Allied military jurisdiction (Sec. 2[1]

[58] Par. 5. [59] The Times, London, August 3, 1942.

[60] On this see also the Lord Chancellor Viscount Simon, Parl. Deb., Lords, Vol. 124, col. 60 (July 29, 1942).

of the Allied Forces Act) and to the exclusion of Allied military jurisdiction in cases where a person has been acquitted or convicted by a British civil court (Sec. 2[3]). The same applies to the exclusion of Allied jurisdiction in cases of murder, manslaughter and rape, committed by members of non-American Allied forces. This exception is not provided for in the Allied Forces Act [61] but in the military agreements concluded with the Allied Governments.

In this connection it is important to note that, as Professor Arthur Goodhart explained to the British public,[62] there is a striking difference between British and American constitutional practice. In Great Britain the civil courts continue to try members of the armed forces for criminal offences even during wartime, but this is not true in the United States. Thus Article 74 of the American Articles of War provides that the military authorities must hand over any accused person to the civil authorities "except in time of war."

Through the United States Act the jurisdiction of the British courts is excluded, but by no means the competency of the British police authorities. "Most important in the British system is the British policeman. I think we should be very slow to admit that anybody could be usefully substituted for him in respect of the function which he performs. . . . The British policeman will continue to do his duty in this connection, and it is he who will be concerned in case of need in detaining or arresting a suspected person."[63] Sec. 1[2] of the Act therefore provides that "the foregoing subsection shall not affect any powers of arrest, search, entry, or custody, exercisable under British law with respect to offences committed or believed to have been committed against that law; but where a person against whom proceedings cannot, by virtue of that subsection, be prosecuted before a court of the United Kingdom is in the custody of any authority of the United Kingdom," he shall be delivered into the custody of an authority of the United States. The Act, besides providing for arrangements of the two Governments regulating in detail this collaboration between the British and American authorities, also enables the competent British minister to issue general or special directions for the purpose of giving effect to these arrangements.

For the protection chiefly of British officials active in connection with offences committed by American soldiers and sailors the following provision of Sec. 1[3] has been inserted:

"Nothing in this Act shall render any person subject to any liability whether civil or criminal in respect of anything done by him to any member of the said forces in good faith and without knowledge that he was a member

[61] See Art. 3 of the Polish-British Protocol, 1940, quoted by Kuratowski, *op. cit.*, p. 9, note 18, and Article 2 of Annex III of the British-Czechoslovak Military Agreement of October 25, 1940, in Czechoslovak Yearbook of International Law, p. 156, and Article 2 of Paragraph 3 of the Decree of the President of the Czechoslovak Republic of May 13, 1942, in Czechoslovak Official Gazette (London), Vol. III, No. 9.

[62] The Times, August 11, 1942.

[63] Viscount Simon, *loc. cit.*, col. 63.

of those forces." The provision obviously is intended to exclude actions for trespass to the person, e.g. false imprisonment, of a member of the American forces if the act, otherwise giving cause to such an action, was done in good faith and without knowledge that the person, presumed to be an offender, was an American soldier or sailor enjoying extraterritoriality under the Act.

This brings us to the question of the immunity of the members of the Allied service courts in general and the American service courts in particular. Sec. 1[2] of the Commonwealth Act in all its wordings provides that the members of the service courts and witnesses appearing before them shall enjoy the like immunities and privileges as are enjoyed by a United Kingdom service court and witnesses appearing before it. The expression "Service courts" means naval, military, and (in relation to United Kingdom forces) air force courts, and includes a service court of inquiry, and any officer who is empowered to review the proceedings of a service court or to investigate charges or himself to dispose of charges.

In English law no action lies against a judge of a superior court in respect of any act done by him in his judicial capacity, even though he act oppressively, maliciously, and corruptly. With regard to judges of inferior courts and similar judicial officers, including military courts, no action lies in respect of any act done by him within his jurisdiction. If the military court exceeds its jurisdiction, the court and its members are not protected, and may, according to English Common Law, be sued for false imprisonment. This rule of the Common Law, however, is modified with regard to the Dominion and Allied service courts by Sec. 1[3] of the Commonwealth Act, according to which, where sentence has been passed upon a member of the respective force, then for the purpose of any legal proceedings within the United Kingdom the sentence shall be deemed to be within the jurisdiction of the service court.[64] Thus the question whether the sentence is or is not within the jurisdiction of the Dominion or Allied service court cannot arise at all in proceedings in an English court.

But between the position of the Dominion and non-American Allied service courts on the one hand and the American service courts on the other the following important difference obtains:

By virtue of Sec. 1[3], par. 2, of the Commonwealth Act of a certificate under the hand of the officer commanding a Dominion or Allied force is conclusive evidence of the cause of the detention of a member of the respective force, but not of his being such a member. That means that the British court is entitled to investigate, without being bound by the decision of the service court and by the certificate issued by the appropriate Allied commander, whether the person detained by order of the service court is a member of the force. That is the only exception from the rule that a British

[64] A similar provision was contained in Subs. 9 of Regulation 45 F of the Defence of the Realm Regulations; *supra*, note 2.

court cannot deal with a question which has been settled by an Allied service court. Thus in the decisions in re *Amand* [65] the British High Court entered into the examination of the question whether the applicant for a writ of Habeas Corpus, an alleged deserter or absentee without leave from the Dutch army, was or was not a member of the Dutch armed forces. But this exception does not apply to the American service courts and authorities. It is omitted from the wording of the Commonwealth Act, applied to the American forces, and the American Forces Act expressly states that with regard to the armed forces of the U.S.A. the very opposite of the provision in force with regard to the other Allied forces shall be law. Sec. 2[2] of the United States Act reads:

> "For the purposes of any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may be appointed for the purpose by the Government of the United States of America stating that a person of the name and description specified in the certificate is, or was at a time so specified, subject to the military or naval law of the United States of America, shall be conclusive evidence of that fact."

From this it follows that the British legislature has left it entirely to the United States authorities to decide whether a person is subject to the jurisdiction of the American service courts, without reserving for the local courts the right to enter into the examination of this basic question of their jurisdiction. This rule would also apply in such borderline cases, as e.g. that of a British subject or a *sujet mixte* whose membership in the American armed forces would be controversial. Even then the British courts would be prevented from interfering and the American decision to the effect that the person in question is subject to American military law would be binding on the British courts.

Under Sec. 2[3] of the Commonwealth Act as applied to the United States forces any enactment which imposes upon any person or undertaking obliga-

[65] 1941: 2 K. B. 239 and 1942: 1 K. B. 445.

Cf. Lord Wright's *dictum* in *Amand* v. *Home Secretary* and *Minister of Defence of Royal Netherlands Government:* A. C. (1943), p. 159, ". . . It is clear that the statutory provisions here in question involve a peculiar interference with the freedom of a person resident in this country. He may under them be subjected to a special jurisdiction, no doubt similar to that to which a person subject to military law is subject, but vitally different in that he is subjected to a foreign jurisdiction and code of law, that of the Dutch Government enforcing its military law. There is, therefore, introduced a species of extraterritorial jurisdiction, however limited, and the Dutch service courts are given jurisdiction to enforce their sentences. But this jurisdiction is only possible so far as it is authorized by the British legislature and can only be exercised in accordance with the statutory provisions referred to and subject to the conditions and safeguards specified by statute. In particular, the British court must be satisfied that the person in question is subject to Dutch military law and is, *prima facie* at least, an offender against that law. In these matters the British court has jurisdiction and the person concerned is entitled to exercise all the rights which British law affords to safeguard his legal liberty."

tions in relation to United Kingdom forces, or any of them, or any member or service court thereof, or penalizes misconduct by any person in relation to the United Kingdom forces, or any of them, or any member or service court thereof apply—with certain modifications—to the American forces and their service courts. It is not proposed to give here an exhaustive enumeration of the United Kingdom enactments which were thus made to apply to American forces and service courts. It may suffice to mention such of them as appear to be of a more general interest.

Under Sec. 125 of the Army Act [66] every person required to give evidence before a court-martial may be summoned and ordered to attend. During his necessary attendance in or on the court-martial and in going to and returning from the court he has the same privilege from arrest as if he were a witness before a superior court of civil jurisdiction. Default in attending, refusal to take an oath, refusal to produce any document, refusal to answer any question constitute offences to be punished by the civil courts of the United Kingdom (Sec. 126[1]). False evidence wilfully given before a court-martial is punishable as perjury by the British courts (Sec. 126[2]). The same applies under Sec. 126[3] to contempt towards a court-martial by using insulting or threatening language, by causing any interruption or disturbance in its proceedings, or by printing observations or using words calculated to influence the members of or witnesses before such court or bring such court into disrepute. The corresponding provisions regarding the Air Force and Air Force courts are contained in Sections 125, 126 of the Air Force Act [67] and those regarding the Navy and naval courts in Sections 66 and 67 of the Naval Discipline Act, 1866.[68]

It is provided in the Commonwealth Act, as applied to United States forces, that for the provisions of the United Kingdom forces law relating to the summoning of witnesses, other methods, prescribed by order, may be substituted. The summoning both of civilian witnesses and of witnesses who are subject to British forces law has been regulated by orders made by the Army Council and Air Council [69] and by the Admiralty.[70] The summonses issuing from American service courts to civilian witnesses contain the information that "failure to obey this summons will render you liable to punishment under the law of the United Kingdom."

As regards reports of proceedings in newspapers it is provided by Sec. 3 of the Law of Libel Amendment Act, 1888,[71] that "a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorize the publication of blasphemous or indecent matter." The question arises

[66] 44 & 45 Vic., c. 58.
[67] Air Force (Constitution) Act, 1917, 7 & 8 Geo. 5, c. 51, sec. 12.
[68] 29 & 30 Vic., c. 109.
[69] S. R. & O., 1942, No. 1679.
[70] S. R. & O., 1942, No. 2192.
[71] 51 & 52 Vic., c. 64.

whether from this provision, in connection with the provision of the Commonwealth Act extending the privileges of United Kingdom service courts to American service courts, it follows that newspaper reports of proceedings of American service courts are privileged. The answer to this question would seem to depend on whether the privilege provided for in Sec. 3 is a privilege of the court or a privilege of the press. Only if it is to be construed as a privilege of the court would it seem *ipso facto* to apply to the American courts. In case the privilege granted by Common law and statute to reports of matters of public interest should be looked upon as a privilege of the press further questions would seem to enter in, *viz.* whether the privilege attaches to reports of British proceedings only or whether it comprises also proceedings of foreign courts. The prevailing opinion seems to be that the privilege extends to the proceedings before any court recognised by English law, and as the exercise of the powers of the foreign service courts is lawful under Sec. 1[1] of the Allied Forces Act, the privilege extends to reports of their proceedings. The Attorney-General, at least, expressed the view [72] that Sec. 3 of the Law of Libel Act refers to any court exercising judicial authority, that it is not restricted to the High Courts and applies also to American forces courts.

Of the number of other statutory provisions, protecting the armed forces of the British Crown from interference, which seem to have been extended to the American forces by Sec. 2[3] of the Commonwealth Act [73] we would mention two:

(1) The Incitement to Mutiny Act, 1797,[74] which makes it a felony punishable with penal servitude for life maliciously and advisedly to endeavour to seduce any person or persons serving in His Majesty's forces by sea or land from his or their allegiance to His Majesty, or to make or endeavour to make any mutinous assembly, or to commit any treasonable or mutinous practice whatsoever.

(2) The Incitement to Disaffection Act, 1934,[75] makes it an offence, maliciously and advisedly to endeavour, to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty.

III. Membership of an American Force

The notion of "member" is the pivot of the whole system. It is therefore necessary to examine it more closely. All the service courts have jurisdiction only with regard to "members" of the respective forces and in the case of the United States forces the membership has the additional effect that it excludes the jurisdiction of the British criminal courts.

In attempting to analyze the notion of "membership" of an allied or Do-

[72] Parl. Deb., Commons, Vol. 382, col. 924.
[73] Schedule to S. R. & O., 1942, No. 966.
[74] 37 Geo. 3, c. 70. Extended to the Air Force under 7 & 8 Geo. 5, c. 51, sec. 13.
[75] 24 & 25 Geo. 5, c. 56.

minion force we find that the word implies a different meaning under the different sets of provisions applying to Dominion forces, non-American allied forces and United States forces respectively.

Sec. 8[1] of the Commonwealth Act provides that "member" in relation to a visiting force includes any person who is by the law of that part of the Commonwealth to which the force belongs subject to the naval, military or air force law thereof, and who, being a member of another force, is attached to the visiting force, or, being a civilian employed in connection with the visiting force, entered into his engagement outside the United Kingdom. Sec. 8 of the Commonwealth Act does not belong to those provisions of the Act which under Sec. 1[3] of the Allied Forces Act can by Order in Council be applied to the allied forces. Hence the Orders in Council relative to the application of the provisions of the Commonwealth Act to the non-American allies and to the Fighting French [76] contain a special interpretation of the expression "member" which differs from that given in Sec. 8 of the Commonwealth Act. In par. 2 of the Order in Council of October 11, 1940 [77] the definition reads:

> "'Member' in relation to an allied force includes a person who, being a member of another force of the same allied Power, is attached to the allied force, but a person shall not be deemed to be a member of the forces of an allied Power, unless he serves in the armed forces of that Power in a capacity corresponding to that of an officer or other rating or rank of His Majesty's forces."

This definition, by virtue of para. 2[1] of the Order, governs the interpretation of par. 2 of the Order and the Schedule to the Order, i.e. the amended Commonwealth Act. But, as Pavel Hartmann [78] rightly states, according to the law as it stood at the time of writing his note, "it is . . . hardly imaginable how the Allied Forces Act, and the Order, the purpose of which is the application and realisation of the Act, could be used in a satisfactory way unless the term 'member,' used in both, were understood in the same way." It therefore seems reasonable to give the term "member" the same interpretation when used in the Allied Forces Act as when used in the Order. But in the meantime the Allied Powers (War Service) Act, 1942,[79] has introduced a new and distinct definition of the term "for the purposes of the Allied Forces Act, 1940," according to which "a person shall be deemed to be a member of the naval, military or air forces of an allied Power or foreign authority, if he has served in those forces on or after the date of the passing of that Act [80] and has not been duly discharged therefrom, but a person who has not so served shall not be deemed to be a member of any such forces by reason only of his having been called upon to serve therein." This definition, as may be seen at the first glance, differs from that contained in the Orders in Council and the Allied Powers (War Service) Act being the *lex pos-*

[76] S. R. & O., 1940, No. 1818 and 1941, No. 47. [77] S. R. & O., 1940, No. 1818.
[78] 5 Modern Law Review (1942), p. 258. [79] 5 & 6 Geo. 6, c. 29. [80] August 22, 1940.

terior the definition contained in it should be applied also in construing the Orders and their Schedules.

None of the above definitions, however, applies to the United State forces. In respect of those forces a different statutory interpretation of the term, introduced by Sec. 2[1] of the American Forces Act determines its meaning both in that Act itself and in the Allied Forces Act as far as it applies to the United States forces.

Sec. 2[1] of the United States Act reads:

> "For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces: Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom."

Though this statutory interpretation has not been expressly extended to apply to the Commonwealth Act in its application to the American forces, the reasons adduced in the similar cases of the Orders regarding the European Allies and the Fighting French and the Allied Powers (War Service) Act are conclusive also with regard to the construction of all provisions concerning American forces in the United Kingdom.

There can be no doubt that persons who are not citizens of the state to which the force belongs, may be members of its forces and subject to the jurisdiction of its military courts.[81] Under the law in force during the First World War the expression "members of a naval or military force of an Ally" included only persons who were subjects or citizens of that Ally.[82]

As we have seen, of all the definitions of the term "member" contained in any of the provisions with which we have had to deal that referring to United States forces is the widest in scope. The notion is wider than in the case of Dominion forces: while civilians belonging to a British Dominion who entered into their engagement in connection with the visiting Dominion force within the United Kingdom are not subject to the Dominion service jurisdiction, American citizens who did so with regard to an American force fall within the class of persons who are exempt from British criminal jurisdiction though they may have lived as civilians under the King's protection for many years.

In the case of the United States and the British Dominions the British statute and statutory order respectively contain a reference to foreign law, i.e. to American and Dominion law respectively. Membership of non-American Allied forces, on the other hand, is to a certain extent defined by British law independently of the municipal law of the allied country in ques-

[81] Czechoslovak Yearbook of International Law, *loc. cit.*, p. 159; Parl. Deb., Commons, Vol. 364, pp. 1390 and 1403.

[82] Subsection 11 of Regulation 45 F, *supra*, note 2.

tion. In such cases, too, British law impliedly makes reference to the foreign municipal law, for obviously nobody can be regarded as a member of, say, the Dutch army who is not such a member under Dutch municipal law.[83] But in respect of non-American allied forces British law now positively orders that nobody shall be deemed to be a member of an Allied force for the purposes of British law, even though he be such a member under the municipal law of the respective Allied country, provided he has not served in the Allied force on or after August 22, 1940. Moreover, the fact that a person has been called upon to serve in an Allied force does not make him a member of that force under British law.[84]

In connection with the different statutory definitions of the term "member" the following provision of Sec. 5[2] of the Allied Powers (War Service) Act, applying to all Allied forces, including the American forces, must be mentioned:

> "It is hereby declared for the removal of doubt that if any person, while a member of the naval, military or air forces of any such allied Power or foreign authority as aforesaid, has been sentenced by a service court of the allied Power or a service court constituted by the foreign authority, as the case may be, to imprisonment or detention, he may be imprisoned or detained under subsection A of section two of the Visiting Forces (British Commonwealth) Act, 1933, as applied to those forces under subsection 3 of section 1 of the Allied Forces Act, 1940, notwithstanding that he has ceased, whether by virtue of the sentence or otherwise, to be a member of those forces."

A special statutory definition of the term "deceased member of the United States forces" is given in Sec. 5[1] of the Defence (United States Forces—Administration of Estates) Regulations, 1942.[85] By this term is meant "a person dying on or after January 1, 1942, who, at the time of his death, was subject to the military law of the United States of America and serving under the command of the Commanding General, European Theatre of Operations, United States Army." This definition differs from that contained in Sec. 2[1] of the United States Act in the following respects:

> (a) The Administration of Estates Regulations apply to members of the United States Army only, as distinguished from members of the United States Navy. The Regulations therefore speak of a person "subject to military law," whereas the Act refers to both the military and the naval law of the United States.
>
> (b) A condition for the application of the Regulations is the fact that at the time of his death, the soldier was serving under the command of the Commanding General, European Theatre of Operations, while the Act applies irrespectively of whether he serves under this Commanding General or with any other military or naval unit of the United States.

[83] *In re Amand* (1) (1941), 2 K. B. 239.

[84] Sec. 5 [1] of the Allied Powers (War Service) Act, 1942.

[85] S. R. & O., 1942, No. 2562.

(c) Thirdly the Defence Regulations introduce the date of January 1, 1942.

IV. The Scope of American Jurisdiction and Immunity

From the point of view of English law it is legal under the Commonwealth Act and under the Allied Forces Act for the Dominion and allied courts and authorities to exercise within the United Kingdom all such powers as are conferred upon them by their respective laws in matters concerning discipline and in matters concerning internal administration.

The present writer has attempted to prove [86] that "discipline" within the meaning of the Acts of 1933 and 1940 and the British-Czechoslovak Military Agreement of October 25, 1940, must be construed so widely as to cover all the relevant behaviour of the soldier, viz. both military offences and offences against the local criminal law in general. From the point of view of United Kingdom law the Allied and Dominion service courts are entitled to try their members for any offence against discipline and if the military law of the respective Allied country provides that any infringement of the local law is punishable as a military offence, as is the case e.g. in Article 96 of the American Articles of War, then the Allied Forces Act entitles the Allied service court to try it and to pass sentence on the offender.

That the term "discipline," used in the Acts of 1933 and 1940, was not meant by the legislature to be interpreted restrictively also follows from the special legislation introduced in respect of the United States forces. As has been shown above, Sec. 1[1] of the Allied Forces Act has neither been abrogated nor modified in its application to United States forces. Thus the Allied Forces Act makes it lawful in United Kingdom law for the United States service courts to exercise jurisdiction "in matters concerning discipline and internal administration" only. The American Forces Act, on the other hand, provides that no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against member of the United States forces. If the term "discipline" carried a meaning not covering all the relevant behaviour of the soldier there would be no forum, according to English law, before which to try American soldiers for non-military offences. Yet both Governments have agreed that "the United States Service authorities and courts concerned will be able and willing to try and, on conviction, to punish all criminal offences which members of the United States Forces may be alleged on sufficient evidence to have committed in the United Kingdom, and that the United States authorities are agreeable in principle to investigate and deal with appropriately any alleged criminal offences committed by members of the United States Forces in the United Kingdom." [87] Furthermore, in his letter of July 27, 1942, Mr. Winant pointed out "that the Military and Naval authorities will

[86] Czechoslovak Yearbook of International Law, *loc. cit.*, pp. 159–161.

[87] Par. 4 of agreement of July 27, 1942.

assume the responsibility to try and on conviction to punish all offences which members of the American Forces may be alleged on sufficient evidence to have committed in the United Kingdom." If the expression "discipline" did not cover all this, the British Government would have had to introduce legislation to alter Sec. 1[1] of the Allied Forces Act with reference to the United States troops, and from the fact that they have not done so and that the British legislature has left Sec. 1[1] unaltered, it may be seen that it considers this term to cover any criminal offence committed by a member of a foreign force.

With regard to the term "internal administration," Sec. 8[1] of the Commonwealth Act provides that in relation to any visiting force it includes the administration of the property of a deceased member of the force. This provision applies to Dominion forces only and has not been extended to the Allied forces. The question therefore arises whether the Allied military authorities are entitled under United Kingdom law to administer the property of their deceased members. We need not enter into the examination of this question here because it has been settled in detail with regard to the American forces by the Defence Regulation above mentioned.[85] Under this Regulation (Sec. 1[1]) an officer concerned with the effects of a deceased member of the American forces and an officer responsible for his affairs is not required to obtain a grant of representation of the estate of the deceased in order to enable him to discharge any duties required by United States law to be discharged by him in respect of the deceased. United Kingdom law recognises the power of such officer to secure the effects of the deceased, to collect debts due to him and to pay his creditors. For the purpose of authorising any person in the United Kingdom to pay or to deliver any money owing or property belonging to the deceased the production of a valid certificate of appointment of an officer responsible for the affairs of a deceased member of the United States forces has the same effect as the production of a grant to that officer of representation of the estate of the deceased (Sec. 1[3]). To a certain limited extent Sec. 2[1] of the Regulations introduces the immunity of an American officer concerned with the effects of a deceased member of the United States forces from civil proceedings in respect of the estate of the deceased. No action or other proceeding in respect of the estate can be brought against the officer by any person other than the personal representative of the deceased. But even the personal representative cannot bring an action against the officer unless

> (a) He has produced to the "appropriate United States authority," the grant to him of representation of the estate and requested in writing for the delivery to him of the appropriate documents (inventory, certified account and the like) and the payment or delivery to him of all money and property of the deceased and
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> (b) The request has not been complied with within a certain time.

The Regulations (Sec. 3) provide for the facilitating of grants of repre-

sentation of the estates of deceased members of the United States forces and separate provisions relating to grants to certain officials have been issued for England, Scotland, and Northern Ireland respectively.[88]

The Government of the United States of America has designated, and the British Foreign Secretary has declared,[89] the Commanding Officer, General Depot 14, Etousd Army Post Office 507, to be the "appropriate United States authority" for all the purposes of the Regulations.

The appointment of an officer responsible for the affairs of a deceased member of the United States forces is sufficient evidence of the death of that member for enabling representation of his estate to be granted by a court of the United Kingdom (Sec. 3[2]).

Apart from the privileges and immunities in connection with the administration of estates of deceased members an element of extraterritoriality, outside the province of criminal law, is embodied in the provision of Sec. 1[4] of the Commonwealth Act, as applied to the American forces, under which no proceedings in respect of the pay, terms of service or discharge of a member of the American forces shall be entertained by any court of the United Kingdom. This provision applies also to the other Allied forces and to Dominion forces.

In all other respects the members of the Dominion and Allied (including the United States) forces are subject to the civil jurisdiction of the British courts, so far as they do not enjoy the customary diplomatic immunities and privileges or analogous privileges accorded to them under the Diplomatic Privileges (Extension) Act, 1941.[90]

V. The Binding Power of the Decisions of American Service Courts in the Law of the United Kingdom

Sec. 1[3] of the Commonwealth Act was the only provision of the enactment heavily opposed in the British House of Commons though a provision substantially to the same effect had already been embodied in Subsection 9 of Regulation 45F of the Defence of the Realm Regulations in 1918. Sec. 1[3] of the Commonwealth Act provides that the decisions of the Dominion service courts are binding also for the province of United Kingdom law and that, with one exception,[91] they are not subject to any kind of supervision and examination by United Kingdom courts. During the parliamentary proceedings it was pointed out that the provision deprives the members of the Visiting Dominion forces of the benefit of the traditional British remedies for the protection of their personal freedom and other civil liberties, particularly of the protection afforded by the writ of *habeas corpus*, by supervising the service courts under a writ of *certiorari*, etc. It was said that Sec.

[88] First Schedule to S. R. & O., 1942, No. 2562.

[89] S. R. & O., 1943, No. 1320, of September 2, 1943, superseding the order S. R. & O., 1943, No. 169.

[90] 4 & 5 Geo. 6, c. 7.

[91] *Supra* at note 65.

1[3] was a thing "wholly unprecedented in English law," [92] and that "the civil court has to assume that the special court upon which a limited jurisdiction only is conferred has acted within that jurisdiction and that the civil court is absolutely debarred from inquiring whether that jurisdiction has or has not been rightly exercised."[93] The then Solicitor-General admitted: ". . . It is said that we are overruling the right of any court in this country to question the jurisdiction of a subordinate tribunal, like a court-martial to try and sentence men. It is quite true that that is the effect of this Clause." [94] The measure was defended as "a corollary to the Statute of Westminster" [95] and passed after protracted proceedings and after a division. During the present war it became part of the law relating to European Allies, to the Free French, and, with certain modifications, to the United States. In the Schedule to the United States of America (Visiting Forces) Order, 1942, the provision has the following wording:

> "Where any sentence has, whether within or without the United Kingdom, been passed upon a member of the American forces by a service court of the United States of America, then for the purposes of any legal proceedings before a court of the United Kingdom the said service court shall be deemed to have been properly constituted, and its proceedings shall be deemed to have been regularly conducted, and the sentence shall be deemed to be within the jurisdiction of the court and in accordance with the law of the United States of America, and if executed according to the tenor of the sentence shall be deemed to have been lawfully executed; and any member of the American forces who is detained in custody in pursuance of any sentence, or pending the determination by such a service court as aforesaid of a charge brought against him, or pending any preliminary examination by the service authorities of the United States of America, shall for the purposes of any such proceedings as aforesaid be deemed to be in legal custody.
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> For the purposes of any such proceedings as aforesaid a certificate under the hand of the officer commanding an American force stating—
>
> (a) that the sentence specified in the certificate has been passed upon a person of the name and description so specified by a service court of the United States of America; or
> (b) that a person of the name and description specified in the certificate is, or was at any time so specified, detained in custody in pursuance of any such sentence or pending any such determination or preliminary examination as aforesaid;
>
> shall be conclusive evidence of the facts stated therein, and any document purporting to be such a certificate, and to be signed by the commanding officer, shall be received in evidence, and shall, unless the contrary is proved, be deemed to be a certificate so signed.

According to the provisions of the Administration of Estates Regulations certain acts of the competent American authorities in the province of the

[92] But see Subs. 9 of Regulation 45F; *supra*, note 2.

[93] Sir Walter Greaves-Lord, Parl. Deb., Commons, Vol. 270, col. 1084 (November 15, 1932). [94] *Ibid.*, col. 1086. [95] Mr. Duff Cooper, *ibid.*, col. 1090.

administration of estates of deceased American soldiers are binding on the United Kingdom courts and authorities. Mention has already been made of Regulation 3[2] by virtue of which the appointment of an officer responsible for the affairs of a deceased American soldier is sufficient evidence of the death of that soldier. A valid certificate of appointment of an officer responsible for the affairs of a deceased member is for the purpose of any provision of the Regulations evidence of the facts therein stated (Reg. 4[2]).

THE GENERAL COMMITTEE AND OTHER AUXILIARY COMMITTEES OF THE LEAGUE ASSEMBLY

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On December 14, 1939, the twentieth Assembly of the League of Nations authorized the Secretary-General to convene its General Committee and empowered it to decide any question which the Secretary-General and the Supervisory Commission might submit to it until the next session of the Assembly.[1] Since the Assembly also authorized the Secretary-General, with the approval of a majority of the Supervisory Commission, "to take any exceptional administrative or financial measures or decisions which appear necessary" until the next session of the Assembly, the purpose of providing for a meeting of the General Committee would appear to have been to enable measures or decisions other than administrative or financial to be taken if in the opinion of the Secretary-General they were necessary.[2] In view of the general situation prevailing in December, 1939, and in anticipation of developments during the next few months, it is likely that the Assembly meant to leave actions such as convening the Assembly or extending the powers of the Secretary-General to its General Committee. Apparently the General Committee has not been convened. The Secretary-General and the Supervisory Commission appear to have taken such decisions as the circumstances have demanded: reducing the staff of the Secretariat, moving records from and returning them to Geneva, transferring part of the staff to the United States and voting the budget for the years since 1940.[3] When M. Avenol resigned as Secretary-General, in August, 1940, the transfer of the duties of this office to Mr. Lester, formerly Deputy Secretary-General, was confirmed by the President of the Council, the President of the Assembly, by the Supervisory Commission, and by direct messages from the Governments of member states.[4] Nevertheless, extraordinary powers have

[1] League of Nations, Records of the Twentieth Ordinary Session of the Assembly (Plenary Meetings), Geneva, 1940, p. 38.

[2] *Ibid.*, p. 45. For the text of the resolution conferring extraordinary powers on the Secretary-General and the Supervisory Commission, see Official Journal, 1938, Special Supplement No. 183, p. 140. The 1939 Assembly simply renewed powers conferred by the 1938 Assembly.

[3] League of Nations, Monthly Summary, January-February, 1940, p. 11. Geneva Research Centre: Geneva Studies, Vol. XI, No. 8 (December, 1940), *passim;* Information Bulletin, October, 1940, p. 3; L. of N., Report on the Work of the League 1941–'42 (C.35.M. 35.1942).

[4] League of Nations, Brief Statement on the Activities of the League of Nations and Its Organs in 1940–1941, Geneva, 1941 (C.41.M.38.1941), p. 7.

been invested in the General Committee and the time may come when it will be called upon to exercise them. These powers may, in that event, actually be exercised by the Chairman of the General Committee, Mr. C. J. Hambro, who is also Chairman of the Supervisory Commission, and such other members of the Committee as he and the Secretary-General are able to assemble.[5]

Until 1935 the General Committee occupied an obscure, but, nevertheless, important position in the Assembly. Together with the Agenda and Credentials Committees, it assisted the President in the management of the Assembly. At the meeting of the Seventeenth Assembly, the Secretary-General stated that it had been "tending more and more to become the central committee, the political bureau of the Assembly," [6] The purpose of this paper is to describe the origin, organization and functions of the General Committee, and, because of their somewhat similar position in the Assembly organization, of the Agenda and Credentials Committees. At the same time an attempt will be made to discover the basis of the Secretary-General's characterization of the General Committee as a far more important committee than was originally intended.

* * *

Like many other representative bodies having business to transact, the League Assembly was compelled to adopt regulations for its own organization and procedure. The Covenant provides that "all matters of procedure at meetings of the Assembly . . . shall be regulated by the Assembly." [7] The First Assembly met on November 15, 1920, on the summons of the President of the United States.[8] As the United States was not a Member of the League, actual preparations for this first meeting were made by the Secretary-General and the Council.[9] M. Hymans,

[5] The members of the General Committee of the 20th Assembly were the President of the Assembly (Hambro), the Chairman of the Credentials Committee (Costa du Rels, Bolivia), Chairman of the Fourth Committee (de Wiart, Belgium) and the first delegates of Belgium, Great Britain, Canada, Egypt, France, Greece, Portugal and Switzerland. Records of 20th Assembly, pp. 3, 5, and 21. The Supervisory Commission consists of five members elected by the Fourth Committee for the purpose of examining the budget prepared by the Secretary-General and of making recommendations to the Assembly. Its functions, like those of other League committees, expanded with the passage of time. See L. of N., C.3.M.3.1931.X.

[6] League of Nations, Official Journal, 1936, Special Supplement No. 156, p. 63. (Hereafter cited, O.J., Suppl. No. —.)

[7] Article 5.

[8] O.J., 1936, Supp. No. 156, p. 63. For the text of the summons, L. of N. Records of the First Assembly (Plenary Meetings), Geneva, 1920, p. 1.

[9] The Secretary-General, Sir Eric Drummond (now Lord Perth) was named in the Covenant (Annex II). He began the organization of the Secretariat in 1919, before the taking effect of the Treaty of Versailles on January 10, 1920. (See Lord Balfour's report to the Council in O.J., June, 1920, p. 136). The Council held its first meeting on January 16, 1920. Prior to the meeting of the Assembly, the Council had met ten times. (Assembly

Belgian, first by virtue of being President of the Council, and later by virtue of election, presided over the First Assembly.[10] The credentials of the delegates were examined by the Secretariat and the agenda, which was circulated among member states prior to the meeting of the Assembly, was drawn up by the Secretary-General on the basis of decisions by the Council, suggestions of member states and his own judgment. The Secretary-General also proposed rules of procedure which were provisionally adopted to govern the Assembly pending final decision by the Assembly itself.[11] On the suggestion of the President, six committees were constituted to expedite the examination of questions on the agenda. The draft rules of procedure which had been prepared by the Secretary-General were referred to the First Committee with instructions to examine the rules provisionally adopted and to recommend changes considered desirable.[12] The First Committee submitted a new draft of rules of procedure based upon 1) the Covenant, 2) the provisions of the Rules of Procedure of the Council, 3) the provisional rules of procedure, 4) provisions of Rules of Procedure in force in several parliaments and 5) draft amendments prepared by delegations of several states. The Assembly made a few verbal alterations in the draft reported by the First Committee before adopting the Rules of Procedure at its eleventh plenary session.[13]

The First Assembly devoted several plenary sessions to the discussion of matters of internal organization and procedure. The arrangements made then, whether or not embodied in the *Rules of Procedure*, were, in general, adopted at subsequent meetings. Experience led to amendments and deletions of the rules of procedure and to developments not textually added to the rules. In other words, the Rules of Procedure were observed as a guide but usages developed which, with certain exceptions, the Assembly thought unnecessary to adopt formally. For example, the Rules of Pro-

Records, 1920 (Plenary), pp. 128–131). On May 19, 1920 the Council telegraphed President Wilson asking him to summon the Assembly in November. On July 12 the President summoned the Assembly to meet on November 15, in Geneva. (Assembly Records, 1920 (Plenary), pp. 103–104. O.J., June, 1920, p. 125.

[10] By decision of Council, Assembly Records, 1920 (Plenary), p. 104.

[11] *Ibid.*, pp. 31–47, *passim.*

[12] *Ibid.*, p. 47 ff. These committees were reconstituted at every Assembly and were known as the "main committees." Each member state had one delegate on each committee. The First Committee was known as the committee on Legal and Constitutional Questions; the second, Economic and Technical Organizations; the third, Disarmament; fourth, Budget; fifth, Social Questions; sixth, Political. During the years of the Disarmament Conference the Third Committee was not constituted and in 1938 a seventh committee (Health, Opium and Intellectual Cooperation) was appointed. For the function of these committees see Rules of Procedure of the Assembly, Article 14. (C.472.M.204.1934.V.)

[13] For the provisional rules, the draft prepared by the First Committee and discussion in Committee, see Assembly Records, 1920, First Committee, pp. 22–31 and annexes 2, 2a and 2b, pp. 52–67. For debate and decision of plenary session, see Assembly Records, 1920, Plenary, pp. 214–229. For Rules finally adopted, *ibid.*, 236–241.

cedure provided for the General Committee and a Credentials Committee. The Agenda Committee rested on practice until 1936, when provision was made for it in the Rules.[14] In 1936 the Assembly also voted to try the experiment of having a nominating committee of eleven members to "nominate candidates for functions which carry with them a seat on the General Committee."[15]

CREDENTIALS COMMITTEE

Article 3 of the Covenant provides that the Assembly shall consist of representatives of Members of the League. It does not lay down any conditions of a general or special nature as to the qualifications of such representatives. On reporting that the credentials of the delegates to the First Assembly had been verified by the Legal Section of the Secretariat, the Secretary-General suggested that it might be desirable for the Assembly to form some general principles for the guidance of Members in the future in the designation of their delegates.[16] The point was immediately made that each member state was completely free in its choice of delegates and that the Assembly could only verify their credentials from the viewpoint of the legal validity of the nominations, lest the Secretary-General's suggestions be construed too broadly.[17] Rule 5 of the Rules of Procedure makes it plain that the member state has complete freedom in choosing delegates. The member state is merely asked to communicate the names and full powers of its representatives one week before the opening of the session, the full powers to be issued by the Head of the State or the Minister of Foreign Affairs, or the authority in the equivalent position. These credentials, Rule 5 provides, shall be examined by a committee of nine (formerly eight) members to be elected by the Assembly on the proposal of the President.[18]

The importance attached to League committees may be judged partly by their membership. As a general rule the practice in the constitution of the Assembly committees was to provide for as wide a selection as possible and to avoid naming the same states year after year to the same committees. However, some preference was given, undoubtedly, to the states with permanent seats on the Council, the so-called Great Powers.[19]

The names of the members of the Credentials Committee were actually proposed by the temporary presiding officer rather than by the President of the Assembly as called for by the Rules. The obvious reason for this was the

[14] Article 7a, O.J., 1936, Special Supplement No. 155, p. 136.

[15] Article 7b, *Ibid.* It was agreed that unless terminated earlier by the Assembly this procedure should continue through the ordinary session of 1939. For further mention of this committee, see below p. 47, under General Committee.

[16] Assembly Records, 1920, Plenary, p. 37.

[17] *Ibid.* See, also, p. 44.

[18] Rules of Procedure of the Assembly, edition of April, 1937, (C.144.M.92.1937), p. 6.

[19] For discussion of the distribution of committee membership, see below, p. 44.

need for a report on the credentials of delegates at the earliest moment. On only five of the twenty committees appointed since the first Assembly were nationals of the States having permanent seats on the Council named. Special circumstances seem to have dictated their inclusion on four of these occasions. On the first two occasions the Assembly had under consideration the admission of Germany into the League. Perhaps representatives of the former Allied Powers, France and Italy, were placed on the committee which would verify the credentials of the delegates of the former enemy state, Germany, as a friendly gesture. On the two latter occasions the purpose of including representatives of the Great Powers was more than symbolic. In the summer of 1936, after the Italian conquest of Ethiopia and the raising of sanctions against Italy, there was some question about the seating of delegates appointed by the head of a Government who had been driven from power and who had fled from his country. When the Assembly met the Ethiopian delegate requested that the members of the Credentials Committee be elected by the Assembly.[20] However, the usual procedure was followed instead, the Assembly electing the members who had been nominated by the President. He included representatives of Great Britain and the U.S.S.R., both at that time known to be opposed to the recognition of the Italian claims to sovereignty over the conquered territory.[21] The question of accepting the credentials of the Ethiopian delegation was considered at some length before the Credentials Committee reported on them to the Assembly. It proposed their acceptance while admitting that there was undoubtedly irregularity in view of the absence of the Head of the Government from the territory of the state, the fact that the Government was not in the capital and the fact that "a governmental authority" was said to be established in another part of the territory. A roll call vote was taken. The Assembly accepted the report but four states voted against acceptance and six others abstained from voting, thus indicating that several states must have considered the irregularities sufficient ground for refusing validity to the credentials.[22]

No Ethiopian delegates appeared at the opening of the Assembly in 1937. Delegates of Great Britain and France were named to the Credentials Committee, possibly in anticipation of the belated appearance of Ethiopian delegates. The dethroned monarch informed the League, in a communication dated September 8, 1938, that he would send no delegates to the Nineteenth Assembly unless the question of Ethiopia's status were raised.[23]

Except for the discussion over the acceptance of the credentials of the

[20] L. of N., Verbatim Record, Seventeenth Assembly, 21 September, 1936, pp. 2–3.

[21] Records of the sixteenth Assembly, Part II (O.J., Special Supplement No. 151), pp. 34–38, for the attitude of these States. For action of the seventeenth Assembly, Records of Seventeenth Assembly, O.J. (1936), Special Supplement No. 155, p. 35.

[22] Records of Seventeenth Assembly, Plenary, pp. 40–42.

[23] O.J. (1938), p. 669. (L. of N., C.299.M.175.1938.VII).

delegates of Ethiopia, the work of the Credentials Committee appears to have been of a strictly perfunctory character, presenting no issues and giving rise to no discussion.

AGENDA COMMITTEE

The Rules of Procedure, until 1936, made no provision for an Agenda Committee. One was appointed by the President of the Second Assembly to expedite the Assembly's action under paragraph four of Rule 4 of the Rules which provides that "the Assembly may in exceptional circumstances place additional items on the agenda; but all consideration of such items shall, unless otherwise ordered by a two-thirds majority of the Assembly, be postponed until four days after they have been placed on the agenda, and until a committee has reported upon them." Several delegations had submitted proposals after the opening of the session. The President announced that the Assembly should decide whether they involved the placing of new questions on the agenda and whether it was advisable to undertake the study of new questions. To save time he proposed the appointment of a small committee to make a preliminary examination and to report its results to the Assembly. Such procedure, he believed, would assist the Assembly in reaching a decision as to the inclusion of the proposed items on the agenda.[24] The Second Assembly approved of the President's suggestion and subsequent Assemblies adopted the same expedient.

The first Agenda Committee appointed consisted of seven members and included delegates of two of the Great Powers, France and Italy. Only five members were appointed at the Third Assembly, none of them nationals of a Great Power. At the Fourth Assembly, the number was again seven at which it remained with the exception of two sessions (1928 and 1929) when there were eight. Experience seems to have demonstrated that the Agenda Committee has been influential because two of the permanent members of the Council were usually appointed to it. The practice was, generally, to alternate Great Britain and Italy with France and Germany.[25]

The functions of the Agenda Committee as defined in the Rules of Pro-

[24] Journal of Second Assembly, p. 76. The "committee" mentioned in Rule 4 refers to one of the so-called "main committees" to which, according to Rule 14, all items must be referred before the Assembly can decide on them in plenary meeting. The function of the main committee is to discuss the substance of a question and to report, with recommendations, to the plenary meetings on the merits of various proposals. The function of the small agenda committee is to determine whether an item proposed after the Assembly convenes constitutes an addition to the items already on the agenda and, if so, whether the present Assembly should consider it.

[25] On only three occasions after 1926 were no Great Powers represented: 1927, 1937, and 1938. In 1936 only France was represented. In 1939 no Agenda Committee was appointed, the Assembly agreeing to the President's suggestions of simplifying procedure. The General Committee performed the duties of the Agenda Committee (Records of the 20th Assembly, p. 2 and p. 6).

cedure since 1936 were to "consider applications for the inclusion of new questions in the agenda of the Assembly and report to the Assembly thereon." They may be contrasted with the General Committee's functions in respect to the agenda. The General Committee determined the disposition of questions already on the agenda when the Assembly convened, whereas the Agenda Committee determined whether an item which has been proposed after the opening of the Assembly should go on the agenda and, if so, of the current Assembly or of the next. If it decided in favor of admitting a question to the agenda of the current Assembly, it so reported to the Assembly with a recommendation as to which of the main committees the question should be referred.[26] Proposals for the mere reference to one of the main committees of portions of the Report on the work of the League were decided by the Assembly without previous examination by the Agenda Committee.[27]

The Agenda Committee thus afforded a means whereby the Assembly could prevent the introduction of trivial questions or of those which it would be futile to consider. For example, at the Third Assembly the Agenda Committee rejected the Lithuanian Government's proposal that the Assembly consider the question of Vilna and at the Ninth Assembly a proposal to amend the Covenant because of the conclusion of the so-called Kellogg Pact.[28] On the other hand, if a question was deemed of sufficient importance by the Assembly to warrant its consideration, the preliminary examination by the Agenda Committee was no insuperable obstacle. Probably because the Agenda Committee was small and therefore not so widely representative as the General Committee, a few proposals which would normally be laid before the Agenda Committee were referred instead to the General Committee. The latter rather than the former suggested that the application of the U.S.S.R. for admission into the League be placed on the agenda of the Fifteenth Assembly.[29]

The duties of the Agenda Committee, like those of the Credentials Committee, were very formal but essential to the smooth working of the Assembly. They might be highly significant. Its decisions concerning the

[26] Compare Records of Ninth Assembly (Plenary), O.J., 1928, Special Supplement No. 64, pp. 108–109.

[27] During the first week or ten days of each session the Assembly held plenary meetings at which delegates of the member states discussed the report prepared by the Secretary-General on the work of the League since the last Assembly. It was customary for some States to ask that certain portions of the report which deal with matters continually before the League, such as the protection of minorities or the supervision of mandates, be referred to one of the main committees. This procedure permitted States not represented on the Council to discuss questions customarily dealt with by that body. On at least one occasion the General Committee referred a question to a main committee. See O.J., 1938, Special Supplement No. 183, p. 42.

[28] Records of the Third Assembly (Plenary), p. 105, and Records of the Ninth Assembly (Plenary), p. 91.

[29] O.J. (1934), Special Supplement No. 125, p. 59.

admissibility of a question were, however, only preliminary; the Assembly had the final determination.[29a] It would be impossible, therefore, for the small number of states on the Agenda Committee to defeat the wishes of the Assembly.

THE GENERAL COMMITTEE

The General Committee, or *Bureau*, in French texts, was the central controlling agency of the Assembly. The draft rules of procedure submitted by the Secretary-General at the First Assembly provided (Article 7) that "the officers of the Assembly shall consist of a President and a number of Vice-Presidents. The President shall be elected at the beginning of each session by a majority vote of the Assembly. The Vice-Presidents shall consist of the Chairmen of the main Committees of the Assembly. These officers shall form the General Committee of the Assembly." Objections were raised to the Vice-Presidents being indirectly elected. After some discussion, the Assembly accepted the proposal made by the British delegation to increase the number by six, which the Assembly should elect.[30] The Rules of Procedure adopted on November 30, 1920, accordingly provided that "1) the officers of the Assembly shall consist of a President and of six Vice-Presidents, together with the Chairmen of the main committees of the Assembly, who shall be ex-officio Vice-Presidents of the Assembly. These officers shall form the General Committee; 2) the President and six Vice-Presidents shall be elected at the beginning of each session."[31]

(*1*) *Composition*

The question of membership on the General Committee was often of greater concern to the several delegations than membership on the other committees already described. The First Assembly rejected two proposed amendments to the draft submitted by the First Committee relating to the General Committee's composition. One of them was endorsed later to bring

[29a] See report of Agenda Committee of 8 September, 1922; Records of Third Assembly, Plenary, Vol. II, pp. 112–113.

[30] The reasons given for the proposal appear in the statement made by one of the British delegation: "I think that the General Committee might well consist of twelve members, six of them being the Presidents elected by the six Committees in virtue of their special technical capacity, and six of them elected directly by the Assembly. . . . There would be at any rate two great advantages in the plan. . . . In the first place, it is undoubtedly right and proper that the Assembly should directly elect certain Vice-Presidents in respect of their general personal eminence; but also I think it is an advantage in the practical conduct of business that the General Committee of the Assembly should also be assisted by the counsel and advice of the chairmen of the different Committees who will be following the technical work of their respective Committees with minute attention and closeness." Records of First Assembly (Plenary), p. 69.

[31] Article 7. The Rules of Procedure as adopted by the Assembly may be found on pp. 236–241 of the Records of the First Assembly (Plenary). For the Assembly's action, see pp. 214–219.

the rules into conformity with practice and the other, while not endorsed, was also a matter of constant concern of delegations. The latter proposal envisaged the representation of various nationalities in the choice of Vice-Presidents and members of committees. As the First Assembly had applied this principle, to mention it in the Rules was considered superfluous.[32] The former proposal, made by M. Hanotaux of France, provided that in electing the Vice-Presidents the Assembly should vote for "heads of delegations." The President opposed this suggestion on the ground that confusion might arise as the result of heads of delegations already having been chosen as chairmen of main committees and because some delegations consisted of only one delegate. He was supported by M. LaFontaine of Belgium who argued that the Assembly should consider the personality of the candidate.[33] After the First Assembly, however, the practice was to elect those who actually were heads of delegations. What is more significant was the practice of designating another member of a state's delegation to sit in the Committee as a substitute for the member who was elected to it. The President of the Second Assembly refused to permit anyone to sit except the individuals who were named, but his action did not establish any precedent.[34] In 1933 the Assembly endorsed the practice customarily observed by approving an interpretative resolution recommended by the General Committee that heads of delegations, not individuals, be elected Vice-Presidents, and that in the event of his absence another member of his delegation should substitute for him.[35] The emphasis was thus placed upon securing representation of states rather than the special competence which might commend individuals.

Another change was initiated in 1925 when the General Committee invited the Chairman of the Agenda Committee to sit with it. This practice was observed at all subsequent Assemblies. From 1933 the Chairman of the Credentials Committee also was asked to serve on the General Committee.[36]

Except for the interpretative resolution in 1933 the Assembly made no changes in the Rules governing the composition of the General Committee until 1936. From 1929, however, the General Committee was the subject of discussion by an increasing number of delegations. The discussion was directed principally at two questions: 1) representation on the Committee and 2) the method of determining its membership.[37]

The Rules of Procedure provide for the election of the General Committee

[32] See the statement by Rapporteur of the First Committee to the Assembly, Records of First Assembly (Plenary), p. 217.

[33] *Ibid.*, p. 134.

[34] Records of Tenth Assembly (Committees) (O.J., 1929, Special Supplement No. 76), p. 43; statement by M. Hambro before First Committee.

[35] Records of Fourteenth Assembly (Plenary) (O.J., 1933, Special Supplement No. 115), pp. 49–50.

[36] On the first occasion he was asked to serve in order to maintain the Committee's membership at the customary number, the Assembly having decided to set up no Third Committee.

[37] At the Tenth Assembly, there were intimations that proposals for the complete revision of Article 7 would be introduced. See the remarks of the Norwegian delegate, Hambro, both

by the Assembly. Until 1937 they contained nothing about nomination. This was true also of the other Assembly committees. Quite obviously it would have been absurd for the Assembly to begin balloting for these posts without some previous preparation. At the opening of the Assembly each year the presiding officer proposed the names of candidates for the President of the Assembly and of the members of the Credentials Committee. The President elected by the Assembly named the Agenda Committee. The Vice-Presidents were elected by the Assembly from the full list of delegates. The uniform agreement on the six elected each year indicated that a preliminary understanding had been reached.[38]

Actually the making of the slates for all the committees as well as the selection of the Presidential candidate fell to the Secretariat, to which was entrusted the duty of making general preparations for each meeting of the Assembly. At the Seventeenth Assembly, when the creation of a nominating committee was under discussion, the Secretary-General stated that he "felt bound to admit that, from the outset, the Secretariat had played a considerable part in the formation of the General Committee." He added that he regarded it an unsatisfactory method which had sometimes had "incoherent or even unfortunate results." [39] It was due to a similar belief on the part of certain delegates that the setting up of a committee on nominations had been proposed.[40] In presenting the formal proposal for a Nominations Committee, the Norwegian delegate stated that "in submitting its amendment," they "had in view the possibility of putting an end to the practice of lobbying for elections before the Assembly met." They recognized the necessity of preparing for the election by the Assembly, but were of the opinion that any preparation "should be done openly on the responsibility of the Assembly itself by a body designated by it for the purpose." [41]

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before the First Committee and the plenary session. Assembly Record, Minutes of First Committee, pp. 43–44 and Minutes of Plenary Session, p. 139.

It may not have been merely coincidence that this occurred at the same time that the Assembly was discussing the desirability of an examination of the composition and functions of the Secretariat and that such an examination was decided upon. See Minutes of the Fourth Committee of the Assemblies of 1927, 1928, 1929 and 1930, and the resolution adopted by the Tenth Assembly establishing the "Committee of Thirteen" to inquire into the position of the Secretariat. Assembly Records (Plenary), 1929, pp. 166–167.

[38] The President of the Third Assembly announced at the third plenary meeting that the election of Vice-Presidents would be postponed "in order that the delegates might be able to come to some agreement." Records of the Third Assembly, Plenary, Vol. I, p. 30.

[39] Records of Seventeenth Assembly (Committees) (O.J., 1936, Special Supplement No. 156), p. 63.

[40] See especially the observations of the Norwegian delegate before the First Committee at the sixteenth Assembly (O.J., 1935, Special Supplement No. 139, p. 76) and at the seventeenth Assembly (*Ibid.*, 1936, Special Supplement No. 156, p. 62). *Cf.* Felix Morley, The Society of Nations (Washington, 1932), p. 566. His remarks relate to the President of the Assembly. They are also applicable to the General Committee.

[41] *Ibid.* Special Supplement No. 156, p. 62. Later, at the same meeting, he stated that the "proposal had been the outcome of the very unsatisfactory impression left during the last

Criticism of the Secretariat's influence in the actual selection of members of the General Committee was, however, implicit in the remarks which related more directly to the results obtained by the method of selection. As the General Committee's importance increased, more delegations became interested in its membership. Was it as broadly representative as it should be? Should any states be entitled to permanent representation? These questions suggest others, such as why should the General Committee have been more representative? What were its functions which made its representativeness of any importance? If it should have been more representative, how could this have been accomplished? In the discussion the answers to all of the questions which were raised and which might appropriately have been raised are not given. For example, at the Tenth Assembly delegates of Italy, Japan, Peru, Chile and Belgium submitted a proposal that the number of Vice-Presidents be increased from six to eight, with the statement that "since the time when the Rules of Procedure of the Assembly were adopted, the number of members of the League has been increased by thirteen. The composition of the General Committee has thus ceased to correspond to present conditions, and it seems desirable to take steps . . . to enable the General Committee to keep in touch with a larger number of delegations." [42] A delegate of another state asked the purpose of the proposal, was there more in it than appeared in the statement? [43] The *rapporteur* of the First Committee, in bringing the proposal to the attention of the plenary session, ventured the opinion that it was inspired by the desire to have the General Committee able to keep "in touch with the various ideas and existing tendencies" among so many different states having different points of view.[44] The discussion does not provide any explanation of the "present conditions," of the need to increase the size of the General Committee to enable it to perform its functions adequately, or what its functions were which necessitated such representativeness. The proposal was ultimately dropped.[45] Interest in the Committee's representative character nevertheless persisted until the rules of procedure were amended with a view to giving satisfaction to those states which, it appears, suspected that the General Committee had come to be as important, if not more important, than the six main committees.

The amendments were the outcome of a discussion which was the direct consequence of the failure of the Sixteenth Assembly to elect a delegate of the U.S.S.R. as a Vice-President. Since it had been customary for all permanent members of the Council to be elected to the General Committee, this failure

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few years, and particularly last year, by the procedure followed in constituting the General Committee of the Assembly. The desire had been to free the Secretariat from the responsibility of making occult preparations for the elections." *Ibid.*, p. 66.

[42] Records of the Tenth Assembly (Committees) (O.J., 1929, Special Supplement No. 76), p. 42. [43] *Ibid.*, p. 42. [44] *Ibid.*, Special Supplement No. 75, p. 138.

[45] O.J., 1930, Special Supplement No. 85, p. 34. The proposal was embodied in the amendment subsequently made to Article 7 of the Rules of Procedure. See *infra.*, p. 86.

to elect a representative of the U.S.S.R. was obviously noted. The immediate effect was to draw a request from the General Committee to the Assembly that it invite the first delegate of the U.S.S.R. to sit on the General Committee and, further, that "means should be found to remedy this situation, more particularly in view of the custom whereby the representatives of states permanent members of the Council are invited to sit as Vice-Presidents in the General Committee of the Assembly." [46] Subsequently the Secretary-General drafted amendments to the Rules of Procedure which were referred by the President of the Assembly to the First Committee for consideration. Although the Secretary-General's draft was not limited to providing for the contingency of custom being broken again, the purpose in submitting the draft amendments was undoubtedly to execute the General Committee's request since they included provisions that the first delegate of each of the permanent members of the Council should be a member of the General Committee.[47] In view of the general dissatisfaction with the membership of various League bodies, including the General Committee, it is not surprising that the Secretary-General's proposals led to discussion, to substitute proposals, and to adjournment of consideration of any changes to the next year.

In the course of the discussion which occurred in the First Committee at both the sixteenth and seventeenth Assemblies, delegates expressed their opposition to violations of the principle of equality—in the proposal to give a preferred position to the permanent members of the Council,—their approval of making the General Committee more representative, and their opinion that the General Committee had become a powerful organ of the Assembly.[48] The proposal that permanent members of the Council be made Vice-Presidents was defended by several delegates as being merely a formal acknowledgment of an established practice. The majority of the delegates were willing that the practice continue but not that it receive formal recognition.[49]

[46] L. of N. Verbatim Record, 16th Assembly, 11 September 1935 (Third Plenary Meeting), p. 2. The only exception at the regular sessions, in the observance of this custom was the failure to elect any Italian delegate at the Fourth Assembly (1923). Japan was not elected at the special session in February, 1932. On this occasion Japan was a party to a dispute before the League. Italy was elected at the 16th ordinary session prior to the imposition of sanctions.

[47] For the text of the draft amendment, see Assembly Records (Committees) (O.J., 1935, Special Supplement No. 139), p. 97.

[48] For the discussion, see Records of the Sixteenth Assembly (Committees), 1935, pp. 74–78, 80–81; and Records of the Seventeenth Assembly (Committees), 1936, pp. 62–71. The delegates of France and of Poland particularly mentioned the increased importance of the General Committee.

[49] In the 1936 Assembly the Secretary-General defended his proposal by stating that the arrangement for membership on the General Committee of a delegate from each permanent member of the Council had never been contested. "Nevertheless," he added, "the question arose whether that custom should be embodied in a text or should be continued by tacit consent." Records of the Seventeenth Assembly (Committees) (O.J., 1936, Special Supplement No. 156), p. 63.

The outcome of the debate was the amendment of Article 7 of the Rules of Procedure to the effect that the General Committee should consist of the President, eight Vice-Presidents, and the Chairmen of the main Committees and of the Agenda and Credentials Committees, and that the Assembly could decide to add other members. In other words, it was agreed that the General Committee should be enlarged in order that it might be more representative but that no State should be insured of membership in it. The Assembly also decided to entrust the selection of the President of the Assembly and of other members of the General Committee to a nominating committee, "as an experiment," for the next three years, thus accepting the proposal of the Norwegian delegation aimed at reducing the influence of the Secretariat.[50]

The provisions for a Nominations Committee unquestionably filled a gap in the Rules of Procedure. Nevertheless, it is doubtful whether the Secretariat's influence could be eliminated. Considering the nature of the Assembly, the changing character of its membership, the brevity of its sessions, and the competition between delegations for various posts, it was virtually impossible for the Nominations Committee to function without the assistance of the Secretariat. The question whether its influence should have been eliminated might well be raised, in view of the greater opportunity that the members of the Secretariat had to judge the competency of individual delegates than their fellow delegates who were constantly changing. During the discussion of the proposal to establish a nominating committee, and on other occasions, several delegates expressed satisfaction with the results of the preparations made by the Secretariat.[51] They were aware that the selection

[50] Numerous changes were made in the rules of Procedure by the Assembly on October 10, 1936. (1) The first paragraph of Article 7 was changed to read: "The General Committee of the Assembly shall consist of the President of the Assembly, 8 Vice-Presidents and the Chairmen of the main Committees of the Assembly, the Agenda Committee and the Committee for the examination of the full powers." (2) Added to this was a second paragraph: "The Assembly may decide to add to the General Committee the Chairman of other Assembly Committees and, in exceptional cases, other members." (3) A new rule, 7a, was added to provide for the Agenda Committee as described above. (4) "The Assembly adopts as an experiment the following procedure which, unless otherwise decided in the interval, shall have effect down to the termination of the ordinary session of 1939: Rule 7b. 1. At the commencement of each session, the Assembly shall appoint a committee of 11 members whose duty shall be to nominate candidates for functions which carry with them a seat on the General Committee. 2. The provisional President of the Assembly shall submit proposals to it regarding the composition of this Committee. 3. The Members of the Assembly and the Committees shall retain the right to vote for persons other than those proposed by the above-mentioned Committee." Records of Seventeenth Assembly (Committees) (O.J., 1936, Special Supplement No. 156), pp. 83–84.

[51] See, for example, the Swiss delegate's remarks in the 17th Assembly, *Ibid.*, p. 63. A special committee of five which was appointed to consider improvement in the arrangements of the Assembly recommended, *inter alia*, that the President be nominated by a special committee. The First Committee and the Second Committee rejected this suggestion. In reporting the recommendations of the special committee to the Assembly, Mr. Henderson expressed the opinion that the method of choosing the President in the past had been very satisfactory. Assembly Records (Plenary) (O.J., 1930, Special Supplement No. 84), p. 130.

of individuals or of states to be represented on committees was the result of careful calculation of the wishes of delegations, of precedents and of the needs in each situation. In suggesting lists to those presiding over the Assembly, the Secretariat endeavored to distribute the seats among different states and to provide for representation of the different groups of states by which membership of other League bodies was determined.[52] The competency of individuals was not ignored but had to be balanced against these other factors. Some idea of the results achieved during the period before 1936, when the influence of the Secretariat was acknowledged, can be obtained by the following tables:

DISTRIBUTION OF SEATS ON GENERAL COMMITTEE AMONG MEMBERS OF LEAGUE

League Members	62	Committee Members	240	
States represented 5 times	17 (27.4%)	"	"	163 (68%)
Permanent Council Members	6 (9.7%)	"	"	76 (31.7%)
Non-permanent Council Members *	11 (17.7%)	"	"	87 (36.25%)
Latin American States	16 (25.8%)	"	"	33 (13.75%)
Others **	25 (46.8%)	"	"	44 (18.3%)

* Belgium, Canada, Czechoslovakia, Denmark, Jugoslavia, Netherlands, Poland, Rumania, Spain, Sweden, Switzerland.

** Including the nine states which were never represented.

FREQUENCY OF REPRESENTATION ON COMMITTEES

Number of Times	*Number of States*
0	9**
1	12
2	12
3	7
4	6
5	3
6	1
6+	12*

* Belgium (14), Canada (9), Netherlands (9), Rumania (7), Spain (8), Switzerland (12), Jugoslavia (8), Italy (15), Japan (12), Germany (7), Britain and France (every session).

** Albania, Afghanistan, Costa Rica, Dominican Republic, Ecuador, Ethiopia, Honduras, Iraq, New Zealand. One of these (Costa Rica) withdrew from the League in 1927; three of them entered the League after 1930 (Afghanistan, Ecuador and Iraq).

[52] In the election of non-permanent members of the Council the custom developed of electing one state from each of several groups of states, such as the British Dominions, the Little Entente and the Scandinavian countries. The distribution of members of other League bodies, including the General Committee of the Assembly, was influenced by this custom. For example, on the General Committee of every Assembly but one there was a representative of at least one of the states of the Little Entente; representatives of the other two groups mentioned above served at almost every Assembly. For queries about the assignment of seats on the Council according to groups, see the remarks made by the Portuguese representative at the Tenth Assembly (Assembly Records (Plenary), O. J., 1929, Special Supplement No. 75, p. 83); the communication of the Portuguese Government to the Eleventh Assembly, *ibid.*, 1930, Special Supplement No. 84, p. 140. For discussion and description of group representation, see *ibid.*, 1931, Special Supplement No. 94, pp. 15–21; Report of the

PERSONS SITTING THREE TIMES OR MORE

Number of Times	*Name*	*State*
12	Motta	Switzerland *
9	Scialoja	Italy
7	Briand	France
5	Hymans	Belgium
	Beneš	Czechoslovakia
	de Wiart	Belgium
	Aloisi	Italy
	Ishii	Japan
	Nintchitch	Jugoslavia
	Politis	Greece
	Adatci	Japan
	Bourgeois	France
	Balfour	Britain
	Branting	Sweden
3	Zahle	Denmark
	Titulesco	Roumania
	Madariaga	Spain
	de Gimino	Spain

* On several occasions Motta, as President of Switzerland, was made an honorary member.

However careful those selecting the members of the General Committee were to distribute the seats widely and to observe the principle of equality among League Members, it is apparent from these tables that a few states obtained representation far out of proportion to their number. The Great Powers and a small number of European lesser Powers clearly enjoyed a preferential position. The great majority of the states filled a relatively small proportion of the Committee seats. Furthermore, it is noteworthy that of twenty-five individuals who account for a hundred of the two hundred and forty members appointed in those years, only one, excluding two nationals of a permanent member of the Council (Japan), was a non-European. Eighteen of these individuals, those named in the third table above, account for more than a third of the total membership. It is readily understandable, therefore, why there was a demand for a more representative General Committee.

At the same time, it might be observed, it is not unusual to find so small a number of individuals exercising a preponderant influence in any assembly of this kind. In the representative institutions of any government it would be unusual not to find the important positions held by a few individuals who serve their state in many capacities. It is doubtful whether a different method of selection than that employed during the period before 1937 would have produced substantially different results. It is natural for any repre-

special committee on the system of election on non-permanent members of the Council, resolutions of the First Committee and of the Assembly, *ibid.*, 1933, Special Supplement No. 115, pp. 67–68; No. 116, pp. 6–7; and Minutes of First Committee, *ibid.*, Special Supplement No. 156, *passim* and especially pp. 73–76.

sentative body to utilize the experience of its members. The preponderance of European names on the General Committee of the League Assembly may be attributed, at least partly, to the practice of several states, taking advantage of their proximity to Geneva, of sending to successive Assemblies as their delegates those who occupied the highest political posts in the national government.

This preponderance of a relatively few individuals and of a few states was not peculiar to the General Committee of the League Assembly. A casual examination of the proceedings of other League bodies would reveal evidence of the activity and influence of the same individuals over several years, many of them, such as Hymans, Briand, Beneš, Politis and Titulesco, men who were active in the Assembly.

These observations are not made in an effort to justify the practice which was followed in appointments to the General Committee or to question the desirability of amending the practice. It is submitted, however, that the creation of a nominating committee would not by itself result in diminishing the influence of those states and statesmen who were the most influential in the League in the past or in insuring more equitable distribution of seats.

The experience with the Nominations Committee was too short and influenced by factors too abnormal in character to warrant any conclusive estimate as to the merits of this method of appointment over the previous method. Of the three Assemblies which met after 1936, the latter two occurred when the international situation was extremely critical and when states were not much concerned about the League. In 1937, the first year in which the new rules were in operation, no noticeable changes in the composition of the General Committee occurred. The first delegates of the permanent members of the Council were again elected Vice-Presidents, several of the same individuals who had previously served on the Committee were appointed, and the preponderance of the European states was continued.[53] The same thing was true of the 1938 Assembly.[54] It is true that names of states not previously represented on the General Committee appear, but as almost all of the committees appointed had at least one state represented for the first time, there is nothing novel about this. Since the 1939 Assembly met after the outbreak of war with a substantial decrease in the number of states represented, it was agreed that the session should be shortened and procedure simplified. The Agenda Committee was not appointed, its functions being assumed by the General Committee, and only one of the main Committees was set up. Hence the General Committee consisted of only ten members, one member sitting in a double capacity—as an elected Vice-President and as chairman of the main Committee.[55] This Assembly took no decision in respect to the experiment with

[53] Assembly Records (Plenary) (O.J., 1937, Special Supplement No. 169), p. 32.

[54] *Ibid.* (O.J., 1938, Special Supplement No. 183), p. 27. Report of the Nominations Committee, pp. 33–34.

[55] Records of Twentieth Assembly, p. 3.

the Nominations Committee which was to run to the end of this session. The Assembly has not met since December, 1939. However, before adjourning the Assembly of 1939 authorized the General Committee to exercise the extraordinary powers described at the beginning of this paper.

(2) *Activities*

Although there was a manifestation of interest in the composition of League committees in general at the time of the consideration of the General Committee's composition, it is doubtful whether the member states would have given the attention that they did to the General Committee had they not known, or suspected, its growing authority.[56] With the passage of years its functions increased both in number and in importance. Its duties were briefly defined in the Rules of Procedure: Article 8, "In the general direction of the work of the Assembly, in the constitution of such Committees as the Assembly decides to create, in deciding on the communications to be made to the Assembly, in the framing of the agenda for each meeting, and in the determination of the order of priority for its various items, the President shall be assisted by the General Committee;" Article 24, "The General Committee, in cases where it deems it necessary, may revise the resolutions adopted by the Assembly, changing their form but not their substance. Any such changes shall be reported to the Assembly." This definition plainly indicates that the General Committee was meant to be an advisory body to the President whose duty it was to direct the Assembly. In this capacity the General Committee determined when plenary sessions should be called, whether all or only some of the main committees need be set up each year and whether additional committees were needed. It kept informed of the state of business in each of the committees, fixed the date for the election by the Assembly of the non-permanent members of the Council and of the members of the Permanent Court of International Justice when their terms expired or when there were vacancies to be filled. What may be described as the ordinary functions of the General Committee can be illustrated by listing some of the actual matters it dealt with in addition to those just mentioned. For example, it formulated recommendations concerning the interpretation and application of the Rules of Procedure to govern the preliminary stages in the Assembly before the adoption of the budget.[57] It proposed that the admission of Germany into the League and assigning her to a permanent seat on the Council be dealt with by summary procedure, that is, without previous consideration in one

[56] On the composition of League Committees, see especially Council Minutes, 78th Session, O.J., February, 1934, pp. 112–120; Secretary General's Report on Committees of the League of Nations (C.287.M.125.1934); Report of the Committees appointed to study the Constitution, Procedure and Practice of Committees of the League of Nations (A.16.1935).

[57] Annex II of the Rules of Procedure, C.144.M.92.1937, pp. 18–20.

of the main committees.[58] On the suggestion of the President, it was asked by the Assembly to study the matter of construction of a new League building, apart from financial aspects.[59] It created a subcommittee of its own members to study and report recommendations on means of facilitating the work of the Assembly to it for submission to the Assembly.[60] At the Seventeenth Assembly the General Committee proposed the creation of a special main committee to consider the application of the principles of the Covenant and related questions.[61] In 1938 it constituted a seventh "main committee" to consider questions of health, traffic in narcotics and intellectual coöperation.[62]

To this list might be added as ordinary functions several decisions which although not of a strictly routine character would appear proper for the General Committee to take, in view of the special circumstances at the time or because of the normal development of the Assembly's activities. The General Committee assumed the function of drafting and proposing resolutions for the admission of new members into the League.[63] The significance of this action lies in the fact that the General Committee appeared to be able to assume jurisdiction when it desired. At the special Assembly meeting in 1932 it provided for the creation of a General Commission, consisting of a representative of each member state, to consider the Sino-Japanese dispute and acted as executive committee of this Commission until the Committee of Nineteen was appointed for that purpose.[64] At the Sixteenth Assembly the General Committee proposed that in view of the critical state of affairs arising from the Italo-Ethiopian dispute the Assembly should adjourn and not close. When the Assembly reconvened on October 9, on the summons of its President, it was announced that the General Committee had decided to lay the Council's report on the Italo-Ethiopian dispute before the Assembly and prescribed the procedure to be observed in considering it. Subsequently the General Committee recommended that the Assembly create a Coördination Committee to facilitate the coördination of measures to be taken by the members of the League in applying sanctions against Italy.[65] The following July when sanctions were lifted, it was the General Committee which suggested that the Coördination Committee

[58] Assembly Records (Plenary), 1926, Special Supplement No. 44, p. 31.

[59] *Ibid.*, 1927, Special Supplement No. 54, p. 32.

[60] *Ibid.*, 1929, Special Supplement No. 75, pp. 140–141.

[61] *Ibid.*, 1936, Special Supplement No. 155, p. 109.

[62] *Ibid.*, 1938, Special Supplement No. 183, p. 36.

[63] For example, see Journal of Twelfth Assembly, p. 190; O.J., 1937, Special Supplement No. 166, p. 23. Assembly Records (Plenary) (O.J., 1934, Special Supplement No. 125), pp. 62, 64, 74. At the Fifth Assembly the Dominican Republic's application was referred to the Agenda Committee. Assembly Records (Plenary), 1924, p. 144.

[64] Records of special Assembly (O.J., 1932, Special Supplement No. 101), Vol. 1, p. 25, p. 41, pp. 79–89.

[65] Verbatim Record, September 28, October 9 and 10, 1935 (16th plenary meeting).

draft the resolution bringing sanctions to an end. At this same session it drafted and proposed a resolution calling upon Members of the League to submit their views concerning the application of the principles of the Covenant.[66]

The functions just described have been called ordinary because they are of the kind to be expected of a committee appointed to assist the President in the general direction of a body like the Assembly. The fact that some of these functions were not performed in the early years of the Assembly can obviously be explained by the absence of any need for them. Certainly some official or organ of the Assembly had to take the initiative in determining the means by which the Assembly should carry out its duties when faced with such a question as the Sino-Japanese dispute. What, then, did the General Committee do to justify the Secretary-General's characterization of it as "the political bureau of the Assembly" and to arouse the suspicions of many delegations about its role in the Assembly? The Secretary-General did not explain how it had happened that the General Committee had acquired its central role nor did he describe the extraordinary activities except by pointing out that it "was called upon to propose all sorts of important resolutions which could not, by their nature, be referred to the main Committees." [67] The implication of the comment and of the remarks made by several delegates during the different discussions of the General Committee is that it had ceased to be merely a body to advise the President in matters of routine for the proper running of the Assembly and by the gradual accretion of power had assumed the right to deal with matters of substance for which it was not fitted. Concrete evidence of the General Committee's powers and influence is not entirely lacking but it is hardly adequate to explain its importance. Probably only those who have been familiar with the working of the Assembly, who have "inside information," are able to explain. It is possible, however, to describe some of the activities which brought criticism or which are not of the routine character of those already described.

The original draft of the Rules of Procedure provided that the General Committee should appoint such committees as were deemed necessary. The Rules which were adopted, however, authorized it to "constitute" such committees, the appointment to them being, apparently, left to the Assembly. On numerous occasions the General Committee did make appointments. For example, it appointed the head of the Nansen office in 1933 to fill a vacancy, it nominated the members of the Supervisory Commission and appointed the members of the Commission of Inquiry to investigate the Secretariat.[68] This practice was criticized and was also modified in particular instances by action of the Assembly. At the tenth Assembly when the Assembly had under consideration the proposal for a

[66] Verbatim Record, July 4, 1936.

[67] Assembly Records (Committees) (O.J., 1936, Special Supplement No. 156), p. 63.

[68] *Ibid.*, Special Supplement 112, p. 28; Assembly Records (Plenary) (O.J., 1929), p. 140; pp. 166–167, p. 173.

commission to examine the working of the Secretariat, the advisability of the General Committee's acting as an "Election Committee" was challenged.[69] In the following year the Assembly adopted the Fourth Committee's proposal that it instead of the General Committee should submit the list of names for membership on the Supervisory Committee.[70]

Another practice which was introduced after several years was the reference of certain items on the agenda to the General Committee rather than to one of the main committees. The reason for this was apparently to provide for a preliminary examination of a question not yet ready for the Assembly's decision or for retaining a question before the Assembly even though there existed no desire to deal with it immediately. At the very first Assembly the General Committee appointed a sub-committee from its members to consider the Armenian question. Such questions, if placed on the agenda at all, were usually, however, referred to one of the main Committees in accordance with the Rules of Procedure. In later years, nevertheless, reference of items to the General Committee appears to have become a customary practice. The President referred the question of League committees, which was on the agenda of the Fifteenth Assembly, to the General Committee with the explanation that this question was the subject of a report by the Secretary-General "which would necessitate careful examination before the adoption of any procedure for giving effect to it." [71] The question of the Commission of Enquiry for European Union which was appointed originally in 1930 was referred in subsequent years to the General Committee which renewed the term of this commission.[72] Other items on the agenda which were referred to the General Committee for preliminary consideration was the question of prohibiting, under provisions of the Covenant, the supply of arms and war material to belligerents; an amendment to the Covenant to bring it into harmony with the Pact of Paris; and the question of application of principles of the Covenant (12th Assembly).[73] Such a practice as this could be defended as an appropriate means of preventing the agenda of the main committees becoming crowded, or of the President's receiving advice as to the most appropriate committee for particular items, and for other reasons. Nevertheless the practice afforded a means by which a few states could prevent an item on the agenda which might prove embarrassing to several states from reaching a main committee

[69] Assembly Records (Committees), 1929, p. 43.

[70] *Ibid.*, 1929 (Plenary), pp. 140 and 445. Also O.J., 1930, Special Supplement No. 84, pp. 149–150. One writer attributes this change to opposition to the assertion of unwritten authority of the Secretariat "The General Committee is only in theory a representative body, and is largely dominated by the delegates of the Great Powers. Moreover, having duties which are political rather than constitutional in nature, the General Committee relies largely on the advice of the higher officers of the Secretariat in such matters as the making of appointments." Felix Morley, *op. cit.*, p. 538. He does not offer any evidence in support of this statement.

[71] Assembly Records (Plenary) (O.J., 1934, Special Supplement No. 125), p. 34.

[72] *Ibid.* and Assembly Records (Plenary), 1933, p. 35.

[73] O.J., Special Supplement No. 155, p. 38; pp. 43–44, p. 82.

or the plenary session of the Assembly. It might also enable a few states to bring a matter before the plenary session which it was known would be opposed by enough states in one of the main committees to prevent its reaching the plenary session. The attempt was made at the Second Assembly to assign the duty of examining the "Report of the Secretary-General on the Work of the League since the Last Assembly" to the General Committee. It failed because the Assembly objected to any curtailment of the opportunity of all member-states to discuss any question within the competence of the League.[74] The reference of items on the agenda to the General Committee would appear to accomplish in part what the adoption of the proposal made in 1921 would have accomplished.

Perhaps the General Committee's authority was most clearly manifested, prior to the 1936 Assembly, at the extraordinary session of the Assembly called in 1932 to deal with the Sino-Japanese dispute and during the various sittings of the Sixteenth Assembly in 1935 and 1936 occasioned by the Italo-Ethiopian dispute. On both occasions it performed the functions of a main Committee as well as its own ordinary functions in respect to procedural matters by drafting and proposing resolutions for consideration in plenary session. At the outset of the extraordinary session of 1932 the President announced that owing to the special character of the session it would not be possible to apply the Rules of Procedure in their entirety and that he would consult with the General Committee to determine the best means of dispatching the business before the Assembly. At the conclusion of the discussion which followed the formal presentation of statements by the disputants, in accordance with the procedure it had recommended, the General Committee was constituted a drafting committee to submit resolutions for the Assembly to consider.[75] Similarly in 1935 and 1936 the procedure needed for special circumstances was devised by the General Committee which also presented significant draft resolutions, such as the one to bring an end to sanctions.[76]

At the three Assemblies which met after 1936 the position of the General Committee appears to have remained unaltered. It performed the same kind of function as before, both ordinary and extraordinary, including the presentation of a resolution to the Assembly, at the time of the Munich crisis, deploring the grave situation which existed in Europe.[77] However, as was pointed out at the outset, authority was conferred on the General Committee of the Twentieth Assembly to act in respect to some matters virtually as Council and Assembly until circumstances would permit the resumption of their meetings.

[74] Records of Second Assembly (Plenary), p. 42.

[75] See references cited in footnote 64.

[76] O.J., 1935, Special Supplement No. 138, pp. 98–101, p. 113 and Assembly Records, 16th Assembly (Plenary) (Part II) (O.J., 1936, Special Supplement No. 151), pp. 65–66.

[77] O.J., 1938, Special Supplement No. 183, pp. 94–95.

EDITORIAL COMMENT

INTERNATIONAL JURISPRUDENCE — ANALYTICAL AND FUNCTIONAL

Professor Hans Kelsen, to whom the world is indebted for many useful theories in the field of analytical jurisprudence, has advocated as the next step to be negotiated among the states, in order to "eliminate war," the compulsory submission to international adjudication of all disputes between states.[1] He discounts the practical objections to this happy solution of conflicts by asserting that historically courts of arbitration preceded legislatures in primitive society, that there is no substantial distinction between legal and political questions, and that international law, which has been said to cover only a small part of international relations, really covers the entire field, by "permitting" the states to regulate much of it municipally.

It would be splendid if the states were willing to subscribe to treaties agreeing to submit all their disputes to arbitration. But the experience neither of the progressive nineteenth century nor of the possibly retrogressive twentieth justifies any such hope. Even though great advances had been made in persuading nations to submit disputes to judicial determination, to which the United States and Great Britain made exceptional contributions and which is marked by the crowning achievement of the Permanent Court of Arbitration and the Permanent Court of International Justice, states had always excepted from the obligation to arbitrate matters which they deemed of major importance. They used various devices to accomplish this result. Even the willingness to submit "legal" questions in the abstract did not prevent the refusal to submit a particular matter in the concrete. For example, Mexico had no hesitancy in declining, on May 3, 1940, the Department of State's proposal of April 1, 1940, to arbitrate the legality of the Mexican oil expropriations.[2] Because the first "courts" in primitive society may have had only the power to arbitrate, authorizing self-help,[3] there is not much justification for the assumption that compulsory jurisdiction will develop out of voluntary arbitration, or that international legislative and executive

[1] This JOURNAL, Vol. 37, p. 397.

[2] Even apart from the reservations to the obligation to submit, usually locally interpreted, many other devices are available to avoid arbitration. Disagreement on the conditions, including framing the issue, afford a common exit. For example, a certain Foreign Office has been known to express willingness to arbitrate a claim, but later to make the condition that the claimant country agree to arbitrate a claim of the defendant country which it had itself pronounced invalid and which it was well known the claimant country would justifiably decline to arbitrate.

[3] Some legal historians doubt the supposed evolution of organized courts from voluntary bodies with arbitral powers. *Cf.* W. Seagle, The Quest for Law, New York, 1941, pp. 60–61, 64, 93.

bodies are probable later stages of organizational evolution. The existence of states with their historical *mores* would seem to foreclose such hopes.

It is moreover doubted whether all conflicts originate in specific disputes, though they may originate in resentments, expressed or unexpressed, or in conflicting positions, policies and attitudes. Resentments over defeat or disadvantage in the competitive struggle may have to be borne municipally without effective complaint, but internationally the world is not so organized. There resentments may find expression in diplomacy and forceful action, whether the cause be "legal" or not. What "dispute" was there, to speak only of current events, between Russia and Germany, between the United States and Italy, between Great Britain and Italy, between Italy and Germany? There was no prior demand or ultimatum in these cases, nothing to arbitrate; and yet there was war. Of course military alliances may lead to wars between nations not hostile, but this alone does not account for all the wars listed above.

It is not perceived why it is necessary to speculate upon and provide for the enforcement of the decisions of an international court, with compulsory jurisdiction, if such an institution can be conceived at this time, whether by an international "police" acting as agent of a centralized executive power, or by the other states, "members of the international community," acting at the direction of an agency like the Council of the League, a subsidiary organ of the Court. As Dr. Kelsen himself says (p. 399): "Seldom has a state refused to execute the decision of a court which it has recognized in a treaty." The real hurdle has always been the difficulty to persuade states to *submit* to arbitration. The enforcement of decisions may be disregarded as a superfluous worry.

While Dr. Kelsen is correct in maintaining that the distinction between legal and political questions, as an obstacle to or limitation on adjudication, is theoretically unsustainable or subjective only, since all questions between states are political and any question can be made "legal" by submitting it to judicial determination,[4] the distinction representing a difference between willingness and unwillingness to submit, there is nevertheless much practical justification for the distinction. Had it not been for the endeavor of the nations in the first Hague Conference to segregate questions inherently susceptible of adjudication by the application of well-known principles of law from those more commonly regarded as falling within the sphere of political interests not based on law, we might not have had the submission of any but trifling issues. That the distinction serves a practical purpose may be inferred from the numerous treaties of arbitration concluded in the 20th century, and from Article 36 of the Statute of the Permanent Court of International Justice which, by naming certain types of "legal" issues over which

[4] *Cf.* H. Lauterpacht, The Function of Law in the International Community, Oxford, 1933, p. 153; E. Borchard, The Distinction Between Legal and Political Questions, Proceedings of the American Society of International Law, 1924, pp. 50 *et seq.*

compulsory jurisdiction might be exercised under the Optional Clause, gave a special inducement to numerous nations, even under reservations, to subscribe to Article 36. Other treaties agree to submit such disputes to arbitration, under conditions. The fact that a court can have no independent existence, but must rest upon the willingness of states to maintain it, is indicated by recent history. For that reason, excessive demands must not be made upon it; to invoke it for the decision of a question more "political" than "legal" might do the court and the judicial process great injury. Then there are many matters of international import which the prevailing *mores*, in spite of analytical jurisprudence, actually consider as "domestic." Would the United States submit to international arbitration such questions, all having international repercussions, as to how much subsidy shall be granted to American shipowners; at what rate the merchant fleet shall be chartered; whether the United States shall open its doors to Oriental immigration and on what terms; how high the tariff shall be on specified goods? Major resentments arise out of claims admittedly having no legal basis, like the Japanese resentment at American exclusion, the competitive loss of certain markets, the disparity in natural resources or capital, where submission to a court could have only one result, perhaps fanning embers of resentment into flame. It is best not to press logical theorems too far.

But the principal claim made by Dr. Kelsen rests on the analytical theory that international law controls or governs not some, but all relations, between states.[5] The provisions of the Covenant, Article 15, § 8, and of the General Act of 1928, which refers to "questions which by international law are solely within the domestic jurisdiction of States," are said to be of doubtful validity since "all" questions are within the jurisdiction of international law. Why is that, since it is well known that commercial or immigration policy is a matter for states to decide, except as they might agree to international regulation? Because when "by international law" a matter is "left" to the domestic jurisdiction or not governed by any known rule of law, it is said that international law has "permitted" the state to regulate the matter as it chooses and has refrained from regulating the matter itself. Thus, "what is not forbidden is permitted." Hence what is not regulated is really regulated, by "providing" that international law will have nothing to do with the matter; and if it is to be regulated at all, this must be done by states municipally. Thus it is, so runs the argument, that international law is all-pervasive.

This may satisfy the monists,[6] and the Hohfeldians have no difficulty in understanding what they say, but it is historically untrue and functionally misleading. States were known before international law had developed, even to its present primitive estate. Its very subjects, states, limit its scope.

[5] *Op. cit.*, 402.

[6] Borchard, The Relation between International Law and Municipal Law, 27 Va. L. Rev. 137 (Dec. 1940).

By custom and treaty the domain of international law was gradually extended, though often honored in the breach. It is thus a delegated body of law, covering only a limited number of topics and relations; powers not delegated have necessarily been reserved. This is even more true of international law than in the case of the United States Constitution, where the doctrine of implied powers has by construction greatly extended federal power. This approach of the dualists is more realistic, in that it reflects facts. To say that international law "permits" some fields of international relations to remain unregulated internationally, but only nationally or not at all, would seem unnecessarily to complicate a relatively simple matter and hardly to promote compulsory jurisdiction.

EDWIN BORCHARD

REGISTRATION OF TREATIES BY THE PAN AMERICAN UNION

The record of the Secretariat of the League of Nations in the execution of Article 18 of the Covenant is one of conspicuous success.[1] From 1920 to the close of 1942 a total of 4,821 current treaties or engagements were registered with the Secretariat, and the texts of 4,745 instruments, with translations and information concerning them, were published in the 202 volumes of the League of Nations *Treaty Series*. The value of this service was appreciated not only by the Members but also by states not Members of the League of Nations; since 1934, the United States of America has regularly registered its treaties,[2] and the procedure to be followed was stabilized by Departmental Order No. 1078 of August 6, 1942.[3]

This success has stimulated general interest in the registration of treaties. At the Eighth International Conference of American States, the Chilean delegation proposed the following plan for registration of treaties by the Pan American Union:[4]

I. Animated by the desire to establish adequate means for keeping the Governments of the Americas regularly and fully informed on the treaties signed by them which go into effect, information which should be useful and should contribute to the organization and prompt application of the inter-American consultative system in those cases in which it may be applicable in accordance with the respective stipulations, the said American Governments agree to register in the Pan American Union all of the treaties which they may sign between themselves or with other States and which may take effect in the future.

II. Each treaty should be registered by the signatory Government, which may be also a signatory of the present agreement, by means

[1] See the writer's studies published in this JOURNAL, Vol. 19 (1925), pp. 273–292; Vol. 22 (1928), pp. 852–856; Vol. 24 (1930), pp. 752–757; Vol. 28 (1934), pp. 546–552.

[2] See this JOURNAL, Vol. 28 (1934), pp. 342–345.

[3] 7 Department of State Bulletin (1942), p. 692.

[4] *Diario de Sesiones*, p. 350. The translation given is from 75 Bulletin of the Pan American Union (1941), pp. 630–631.

of a communication addressed to the Director General of the Pan American Union transmitting a certified copy of the respective treaty and of the official resolutions relating to its promulgation and entry into effect issued by the registrant government.

III. In the event that new stipulations are entered into which modify, clarify or complement previous stipulations already in effect, the registration of the former shall be made by adding to the certified copy of the same the text of the preëxisting stipulations.

IV. The Pan American Union, which shall be entrusted with the Register of Treaties referred to in the present agreement, shall send in each case a certificate of the registration to the Government making the registration and shall inform the other American Governments of the same, sending them certified copies of the official documents referred to in Articles II and III.

V. The *Bulletin* of the Pan American Union shall publish at proper intervals a list of the treaties registered in accordance with the present agreement.

VI. The registration or failure to register a treaty in conformity with the present agreement shall have no influence whatsoever on the effects appertaining to the said treaty.

This plan was adopted by the Conference on December 23, 1938.[5] In execution of the plan, the Pan American Union inaugurated the registration of treaties by American States in 1939.

Under the method followed the Governments are asked to transmit to the Union a certified copy of the treaty to be registered, together with twenty-one additional uncertified copies. A certificate of registration is sent to the Government submitting the treaty; the copies are certified; a copy is communicated to each of the Governments of other States members of the Union of American States; and a copy is filed at the Pan American Union where it is open to consultation. Lists of the treaties registered have been published in the *Bulletin* of the Pan American Union.[6]

Down to June 30, 1943, 217 treaties had been registered by five States: 197 by the United States of America, 13 by Venezuela, 4 by Colombia, 3 by Cuba, and 1 (also registered by the United States) by Ecuador.

MANLEY O. HUDSON

THE INTERNATIONAL REGULATION OF AIR TRAFFIC

A tremendous impetus has been given to the development of air transport by the exigencies of the present war. This is especially manifest in respect to the increase in the speed, range, and carrying capacity of aircraft which the war operations have brought about. It is precisely these qualities in aircraft which have made almost certain a comparable development in the peace-time employment of air transport after the war, particularly in the extension of international air lines.

[5] *Diario de Sesiones*, pp. 984–5.

[6] 75 Bulletin of the Pan American Union (1941), pp. 632–641; 76 *id.* (1942), pp. 525–530; 77 *id.* (1943), pp. 506–510, 595–600.

The problems which loom over the horizon are in part those of a scientific technical character outside the scope of this comment. They also relate, however, to the military security of peace-loving states and to good international relations generally. As early as 1908, in what was probably the first American essay to deal with international law in relation to air navigation, the present writer upheld the inherent right of the national state over its air space. "Protection to the health and safety of its subjects, to its customs and immigration barriers and to its political integrity will always require the reservation of certain rights," [1] he wrote at that time. The creation of an international organization will not reverse the present rule of territorial sovereignty over the air space. Nearly all states have now adhered either to the Paris Convention of 1919 or to the Havana Convention of 1928, in both of which the principle of territorial sovereignty is maintained, but in which certain reciprocal privileges are extended to foreign aircraft within the territories of member states. However, both conventions have been interpreted to deny freedom of air navigation to the operators of airlines except by special agreement. Although this has been disappointing to those interested in the wider development of air transport, progress had been made before the war both in Europe and in the Western Hemisphere by special intergovernmental agreement or by concessions granted direct to foreign air companies.

In the prosecution of the war free air routes have been established for the use of the Allies and the construction of airports in various parts of the world has been undertaken by the United States on foreign territory leased for a fixed period or upon general lend-lease terms. Accordingly, demands have been revived for the adoption of a policy of freedom of the air. Edward Warner, formerly Assistant Secretary of the Navy for Aeronautics, now Vice-Chairman of the Civil Aeronautics Board, well points out that the freedom of the air as now conceived would only be an agreement among sovereign nations to restrict the exercise of their sovereign rights.[2] It is true that internationalization of air transport has been favored in some quarters on both sides of the Atlantic but the operation of airlines represents a great commercial industry and so long as private enterprise remains part of the constitutional structure of the nations the movement will not gain support except among those in favor of collectivism generally.

This does not imply that the system existing prior to the present war must be retained. The end of the war should be made the occasion to permit a greater utilization of air transport in the interest of peaceful international trade. To this end a proposal has been made by Mr. L. Welch Pogue, Chairman of the Civil Aeronautics Board, that reasonable freedom of commercial air transit could be attained under a multilateral convention

[1] Proceedings of the American Political Science Association, 1909, p. 87. Paper read at the meeting of the Association held at Richmond, Va., December, 1908.

[2] Edward Warner in Foreign Affairs, October, 1943, p. 12.

according the right of transit over specified routes and the use of necessary technical services in named airports. The plan has been accepted as practical by the responses of eighteen American airlines. It does not contemplate that foreign companies will be free to engage in domestic air carriage (*cabotage*) and it is therefore not a system of free competition.[3]

A satisfactory solution means more than the adjustment of international trade rights. With the lessons of the past in mind, military security will probably always be the paramount consideration. It will influence all negotiations on civil aviation because of the possibility of espionage from the air, of the possibility of conversion into combat aircraft, and of carrying airborne invasion.[4] On the other hand, the imperative needs of the military forces in the present war have caused a widespread use of transport planes and personnel of the airlines. Domestic and foreign companies have thus made important direct contributions to the war effort.[5] The establishment and maintenance of air routes under international regulation would be to this extent a favorable factor in the preservation of security, assuming, of course, the existence of an effective post-war international authority. The problem presents the necessity of close coördination between the international authority and the regulation of air commerce. No convention however well devised can anticipate the manifold problems, military, political, and economic, which an extended system of international air routes will present. There will be keen competition between the great industrial nations and dissatisfaction on the part of small nations without airline companies, all of which will require continued adjustment. It will be ultimately a problem of administration under the primary control of an international commission for air navigation having quasi-judicial powers comparable to the powers of our own Interstate Commerce Commission, with fair representation accorded to the interests of all the United Nations.

ARTHUR K. KUHN

THE FIRST SESSION OF THE COUNCIL OF UNRRA

The first session of the Council of the United Nations Relief and Rehabilitation Administration (UNRRA) opened at Atlantic City on November 10 and closed on December 1. Its results are embodied in two documents, "The Resolutions on Policy of the First Session of the Council" [1] and the "Re-

[3] Howard P. Whidden, Jr., Foreign Policy Reports, July 1, 1943, p. 95.

[4] Edward Warner, *op. cit.* p. 23.

[5] Lewis C. Sorrell in Annals of the American Academy of Political and Social Science, November, 1943, p. 85.

[1] Reception No. 332; Symbol I/F/5/ No. 12; UNRRA Journal, p. 516. The index numbering system used by UNRRA on this occasion is simple and effective. It was carefully prepared in advance by Mr. George Xanthaky (who served the Council as Secretary for Documentation) with the aid of such experts as Miss Alice Bartlett and Dr. G. C. Dixon. Each document, on being sent to the mimeograph room, was given a serial reception number. The Symbol indicates the origin of the document; e.g. here "I" indicates the First Session,

ports of the Committees of the Council, First Session." [2] The Resolutions were "adopted" by the Council and the Reports were "accepted" by it. The substantive content of these two documents is of great interest and of prime importance to millions of hapless people throughout the world but this comment is concerned only with the general organizational features which are of significance quite apart from the vast tasks of relief and rehabilitation themselves.[3]

From the standpoint of international organization UNRRA is important because it is the first general organization to be perfected during this war; because it is charged with the doing of the task of first importance after the actual defeat of the enemy forces (the preparation of UNRRA's task being part of the process of defeating the enemy) and because some of its features may serve as models for subsequent organizations, even perhaps for the organization of a general character envisaged by the Moscow Declaration of October 30, 1943.

The UNRRA Agreement [4] was negotiated through Foreign Offices and diplomatic missions rather than at a conference as was the case with the United Nations Conference on Food and Agriculture held at Hot Springs in May. The negotiations began as early as the summer of 1942 with the United States taking the initiative and drawing upon the preliminary work of the so-called Leith-Ross Committee in London. Foreshadowing the later alignment at Moscow, Cairo, and Teheran, the leadership was taken by China, the Soviet Union, the United Kingdom, and the United States which together constitute the Central Committee of UNRRA. When these four Governments had agreed upon a text, it was communicated to the other United Nations and to the associated nations, and released to the public.[5] Modifications were made to meet the views of other governments and members of the United States Senate and House of Representatives. These changes in general accomplished two purposes: one, to protect the small states against an excess of power in the hands of the Central Committee; and two, to protect all member states, but especially the large states, against the imposition upon them of any new obligations not freely assumed by their own constitutional procedures and bodies. In both instances the amendments merely reënforced previous provisions.

When general agreement seemed to have been reached through this process of multiple individual negotiation, all of the governments involved were

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"F" indicates that the material emanated from a committee or committees of the Council; "5" is the symbol of the Committee on Ad Hoc Committees which prepared this consolidated document, and "No. 12" indicates that this is the twelfth document from that Committee.

[2] Reception No. 336, UNRRA Journal, p. 597.

[3] A good brief summary may be found in the Foreign Policy Bulletin, Vol. XXIII, No. 9, Dec. 17, 1943, written by Mrs. Vera Micheles Dean, who was a member of the temporary staff of Director General Herbert H. Lehmann. See also Foreign Policy Association, Reports, Vol. XIX, No. 20.

[4] Text in this JOURNAL, below, Supplement, p. 33.

[5] U. S. Dept. of State Bulletin, Vol. VIII, p. 523.

invited to send representatives to sign the Agreement. The ceremony of signature took place in the White House on November 9. The Administration was thereby brought into existence.

The Council of the Administration met in its first session on the following day, November 10, at Atlantic City. The Agreement provides (Art. III, 2) that the Council shall be convened by the Central Committee, but in this first instance the United States *ex necessitate* acted as convener. The United States, again acting on the precedent of general conferences, called the meeting to order through a Temporary Chairman, Mr. Dean Acheson, Assistant Secretary of State, who was subsequently elected by the Council (under Art. III, 1) as permanent Chairman of the First Session.[6]

In still another respect it was necessary for the First Session to depart from the terms of the Agreement of which Art. IV, 4 requires the Director General to supply "such secretariat and other staff and facilities as shall be required for the Council and its Committee." Since the Director General was not appointed by the Council until the second day of the session, November 11, it was obviously necessary for some advance preparations to be made. Again the United States, as host, tendered to the Council a temporary secretariat under Dr. Warren Kelchner, Chief of the Division of International Conferences of the Department of State. This secretariat was, by Art. III, 2 of the Temporary Rules adopted by the Council, placed under the supervision and direction of the Director General and so served during the session, at the close of which it became *functus officio*. The Director General had a small temporary staff of his own in addition. It is worth noting that the permanent staff may tend to develop in two parts, the staff of the Director General at central and regional headquarters and in field missions, and a "secretariat" also selected by and responsible to the Director General, but permanently serving the Council through its standing committees and regional committees.

These Council committees seem destined to have a more continuously active rôle than might have been anticipated prior to the First Session of the Council. It might have been thought that between the sessions of the Council (to be held regularly at least twice a year—Art. III, 2), the Central Committee would be the real spokesman for the Council since it has power, under Art. III, 3, to make "policy decisions of an emergency nature," albeit subject to "reconsideration" by the Council. Actually it now seems likely that the real discussions will take place in the Committee on Supplies, the Committee on Financial Control [7] and the Committees of the Council for

[6] The Chairman of the Council of UNRRA is an official only of the Session for which he is elected, being thus more similar to the President of the Assembly than to the Chairman of the Council of the League of Nations and the Council of UNRRA is in fact comparable rather to the Assembly than to the Council of the League.

[7] Under Art. III, 4 the Committee on Supplies consists of the "principal suppliers of materials for relief and rehabilitation." The following were named: Australia, Belgium, Brazil, Canada (Chairman), China, the French Committee of National Liberation, the

Europe and for the Far East.[8] It is too soon to tell how active will be the rôles of the standing technical committees on Health, Welfare, Displaced Persons, Agriculture, and Industrial Rehabilitation, all of which were created by the Council. All member states who desire may designate members of these five committees. If the member states all choose to be represented and designate their respective members of the Council,[9] who may be diplomatic officers in the capital where the Committees meet and not technicians, these committees are not likely to be efficient instrumentalities. Art. III, 6 provides that if alternates are nominated by the individual members of the Council these must be persons "of special competence in their respective fields of work." At the First Session it seems to have been envisaged that the real functioning technical committees might be the technical subcommittees of the Committees for Europe and for the Far East. In the case of Health and possibly Welfare and Displaced Persons the Standing Committees may tend to acquire greater independent importance. This committee development at Atlantic City was a democratization of the Administration which developed in an interesting way in the short space of three weeks. It was a development comparable to that which took place over a period of years in the League at Geneva, until the Great Powers ceased to have a majority on the Council of that organization. At Atlantic City the evidence of democratic procedure was warmly noted in his concluding address by the Member of the Council for the Netherlands.[10] This democratization is a hopeful sign in international organization. It is a political possibility because the small states do not out of a sense of diplomatic reality actually "gang up" on the Great Powers and make embarrassing vital decisions by their majority votes. It is well known that such decisions if strongly opposed by the Great Powers could not endure and their adoption might well wreck the international organizations from which the small states stand to benefit so much. On normal questions, however, majority votes may well decide the issues even though the great powers vote in the minority.[11] The subject would repay closer study and reveal of how little real import are minute legal safeguards for the Great Powers in the structure of international administration. Their actual protection flows from a more fundamental

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Netherlands, New Zealand, The Soviet Union, the United Kingdom and the United States. The Committee on Financial Control is composed of China, Greece, Mexico Norway, Union of South Africa, Soviet Union, the United Kingdom and the United States (Chairman).

[8] Under Art. III,5 Brazil, Canada and the United States were added to the twelve countries in the European area to form the Committee for Europe. The Committee for the Far East is composed of Australia, China, the French Committee, India, the Netherlands, New Zealand, the Philippine Commonwealth, the United Kingdom and the United States.

[9] The Agreement uses the word "member" to refer both to the state or government which belongs to UNRRA, and to the individual who represents a state on the Council. The resulting confusion is likely to persist but is not serious.

[10] Journal, p. 755.

[11] *Cf.* Riches, C. A., Majority Rule in International Organization, Baltimore, 1940.

source—the fact of their "greatness." Nevertheless the UNRRA Agreement contains abundant legal protection against the imposition of "new obligations" on members whether they be large or small states.[12]

The Council at its first Session revealed itself as a legislative body only in the sense of legislating for the Administration. Its resolutions are not of the type to find their way within the covers of some subsequent volume of Hudson's "International Legislation." They do not seek to impose new obligations on states although some are exhortations or recommendations to states. While not infringing upon the broad executive power vested by Art. IV in the Director General the resolutions do define the broad major policies within which he will operate.

The expenses of UNRRA are met by two separate budgets. The Administrative expenses are met by an Administrative budget (set at $10,000,000 for 1943 and 1944) allocated to the member governments in stated proportions. The Council recognized "that the criterion of allocations hitherto adopted by other bodies" is not suitable to the Administration.[13] The basis for allocation is subject to reconsideration in successive budgets. The present range, stated in percentages, is from forty per cent for the United States to one half of one per cent for a number of smaller states.

The general operating budget or supply budget obviously could not be fixed in detail but a basis of national contribution is fixed in the "Financial Plan." [14] The basic scheme, suggested by the United States, has an appealing simplicity; each member government is to contribute the approximate equivalent of 1% of the national income of the country for the year ending June 30, 1943, as determined by the member government itself. Special recognition is accorded the peculiar situations obtaining in certain states whose contributions will accordingly vary from the norm. The total sum estimated from these contributions is about two and one-half billion dollars. Governments are urged to contribute not less than ten per cent in free exchange. The balance normally would be in the form of credits in local currency available for the purchase of supplies and services in that country.[15]

Resolution No. 37 [16] deals with Personnel Policies and assures to UNRRA a real international civil service. The practice of seconding individuals to the international staff, not only from national services but also from other international services was approved. Governments were urged to provide suitable facilities and immunities for the Administration, its Council, and committee members, and its staff.[17] There are also interesting provisions for priorities and immunities for goods in transit and to facilitate official

[12] *Cf. e.g.* Arts. VIII, V and VI. The basic achievement was the insertion in Art. III, 1 of the provision that except in special cases "The Council shall vote by simple majority."

[13] UNRRA Journal, p. 634. [14] Resolution No. 14, UNRRA Journal, p. 543.

[15] The remaining details of the Financial Plan are skillfully elaborated and are of general interest but can not be discussed in detail here. States whose territories have been occupied are not called upon to contribute the 1% but may make voluntary contributions.

[16] UNRRA Journal, p. 576. [17] Res. No. 32, UNRRA Journal, p. 568.

correspondence and other communications of the Administration and the travel of its staff.[18]

Finally it should be noted with approval by international lawyers that, from the outset, UNRRA set the precedent of friendly coöperation with other international organizations.[19] Observers from the League of Nations technical organizations, the International Labor Organization, the Intergovernmental Committee on Refugees, the United Nations Interim Commission on Food and Agriculture are invited to attend and to participate in future meetings of the Council and its committees. At Atlantic City particular assistance was rendered by experts from the I.L.O. and from the Economic, Financial, and Transit Department of the League of Nations. Members of these staffs had also generously assisted in the preparatory work for the conference. The continuation of such collaboration will go far to allay fears which may exist because of the multiplicity of international organizations. Whether or not they are eventually merged in some general body is of less importance if they can work out a thorough basis for day to day cooperation.

PHILIP C. JESSUP

THE JURIDICAL SIGNIFICANCE OF WORLD WAR II

The military successes of the Allies and the spectacular series of conferences between their great leaders have impressed upon the world that the Fascist and Nazi regimes will be defeated and the aggressors made to disgorge their battle-gotten gains. The democracies have learned their lesson from hard experience and realize that the doctrine of absolute neutrality and the policy of isolationism are dead. Tried at the cost of millions of dead and of billions of wasted treasure, and found wanting, they have been finally cast away. Yet this recognition of the obligation resting upon each state to act singly and collectively against every aggression really involves no change in the system of international law. The correct view as to this obligation was recognized and proclaimed generations—nay centuries—ago. But the states less immediately threatened have in the past only too often preferred to treat the conflict as political and to seize the opportunity for commercial profit which neutrality afforded. Henceforth the peace-loving states will not hesitate to intervene betimes against the aggressor and the assurance of this action will be of tremendous value in restraining aggression. The very certainty that other states will come to the rescue will make their intervention unnecessary, as we have seen in the case of the Monroe Doctrine. Covetous nations so clearly understood that any war of conquest against an American Republic would lead to the intervention of the United States that not even the most land hungry power dared to make the venture. So will

[18] See Reception Nos. 104, 105 and 107. The last is of special interest as a brief collection of precedents for immunities for staffs of international organizations.

[19] See Reception No. 24 and Resolution No. 5, UNRRA Journal, p. 528.

it be with aggression. Now that the sterile doctrine of the absolute right to remain neutral and isolated has been tried and found wanting, and cast away forever, no froward power will dare to wage a war of conquest or even to have recourse to isolated acts of aggression.

This important result of the great conflict in which we are engaged is perhaps no more significant than is the reaffirmation and support which has been given to another principle of international law. In the Atlantic Charter and subsequent proclamations and pronouncements the United Nations have by necessary implication given support to the obligation of intervention on the ground of humanity. The positivist who examines pre-war state practice objectively will inevitably discover that humanitarian intervention finds support in that practice. The intercession of Great Britain and the United States in favor of the oppressed Jews in Roumania and the representations of the United States to Peru relative to the abusive treatment of the natives of the Putomayo region afford examples. In other instances states have, within their own territory, imposed unusual regulations upon foreign shipping justified only upon humanitarian grounds, as when Britain enforced the Plimsoll load line upon all vessels, even those under a foreign flag, that entered her harbors. Similarly, in our own harbors we have enforced upon the ships of all nations the humanitarian provisions of our Seaman's Act, which we owe to the statesmanship of that great labor leader and humanitarian Andrew Furuseth. Just so, upon humanitarian grounds, warships of certain states when enjoying the courtesy of a visit in a foreign port have refused to deliver to the local authorities slaves that escaped to their decks. Too numerous to mention are the cases where considerations of humanity have justified the giving of asylum to political refugees in legations and consulates. Notwithstanding this array of precedents, the existence of the right of intervention on the ground of humanity has been denied by many respected writers on international law. Governments also, fearing that some application of this doctrine inconvenient to themselves might be made, have preferred to deny the existence of the right to which their own conduct has given validity.

International law follows international practice, however, and not the passing euphemisms of diplomatic correspondence, more influenced by reasons of state than by juridical considerations. With every increase in the means of international communication, and with every advance in our civilization and culture, we have become more sensitive to suffering and injustice irrespective of the nationality or race of the victim. This accounts for the increasing number of instances of humanitarian intervention recorded in state practice. Law must eventually conform, albeit somewhat slowly, to the facts of our international relations. That eminent jurist, John Westlake, has truly said: "Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance, we will not say of average human nature,

since laws may fairly expect to raise the standard by their operation, but of the best human nature that at the time and place they can hope to meet with."[1]

The present war of liberation and the accompanying proclamation of the new freedoms is the complete and permanent recognition of the sentiment of this "best human nature." Action taken in defense of humanity is the foundation upon which our advance in civilization must rest. International Law has made another advance which brings our world law closer to morality, since we have come to recognize that we are our brother's keeper. Accordingly, step by step we shall make good each freedom and achieve at last the brotherhood of man.

ELLERY C. STOWELL

MOSCOW; CAIRO; TEHERAN

The declarations and statements issued as a result of the transactions of the Foreign Ministers and chiefs of state of China, Great Britain, Russia, and the United States at Moscow, Cairo and Teheran between late October and early December of the past year invite careful scrutiny by all students of international law and organization.[1] Earlier declarations of United Nations war aims and peace plans were very general, not to say vague, in character. Meantime the international situation in general, and the war or the military situation in particular, have evolved considerably, and these statements may be regarded as the first serious indications of the kind which we have had and certainly the last we have had down to date. They are also, probably, the last which we are likely to have for some time to come.

It is in respect of just this point that the declarations in question first call for comment. They have been long delayed; they are excessively sketchy; and they do not promise to be elaborated upon very soon. Reason for such reticence can be found to a certain extent in the difficulty of reconciling the policies of the four leading powers on the United Nations side, not to mention the whole thirty or forty allied nations; the fighting strength of the coalition might be weakened by stirring up too many controversies over war aims. There is also the possibility of saying something which would give the enemy material for propaganda which would strengthen his resistance or influence neutrals in his behalf. These are obvious considerations to be borne in mind. Yet it must be replied that sooner or later agreement must be reached among the leading members of the United Nations group, and not merely among the present four but including also the French. The agreement of absolutely every member of the group might not be essential but public opinion or popular prejudice in the principal countries must be guided toward the objectives which are to be sought in the war and the peace to follow. The disastrous effects of neglecting this step are too familiar to all

[1] International Law, Cambridge (Eng.), Part I, Peace, 1904, p. 307.

[1] See documents below, Supplement, pp. 3, 8, 9.

students of recent history to need recalling. Hundreds and thousands and even millions of people in this and in a dozen other countries are desperately interested in the issues involved and are busy forming their own opinions about them. Now it cannot be supposed that these people are going to be permitted to write the peace, but they must either be informed and influenced on these questions or there will be a terrible clash of opinions. If the programs put forward by United Nations Governments do not satisfy the desires of people in those countries the outbreak of criticism and defection will be formidable. When responsible and conservative bodies of the people's representatives take such revolutionary action as that embodied in the Fulbright and Connolly resolutions it is time to pay attention to what lies back of them.[2] It rather seems as though the four rulers had unduly slighted this angle of the problem. Of course, observers have been able to compile volumes of material on the war aims of the United Nations by winnowing the words of their spokesmen of varying rank, but it is not clear how much weight is to be attached to these indications and more light is urgently needed from above.

In the declarations themselves many points invite comment, including the idea of unconditional surrender, peace and security for the future, disarmament, enforcement, general international organization, and war crimes. To these might be added the declarations concerning individual countries (Austria, Iran, Italy, Japan, Korea), and other questions—the sovereignty and equality of states, consultation, non-intervention, liberty and democracy—subordinate to the main points.

The lessened emphasis upon the idea of unconditional surrender does not probably imply any drift in the direction of a negotiated peace. It may be traced to the fact that these declarations were intended not so much for Axis populations as for United Nations and neutral peoples. And, after all, surrender means nothing except an opportunity (for the victor) to do something, and the real question is what he is going to do. Hence the emphasis on other matters.

Repeated reference is made to the prevention of aggression, to security, and to the preservation of peace, but little indication is given as to how these things are to be accomplished. Quite definitely a system of collective security is implied but details are left to the future. Perhaps no serious student of the problem would quarrel with this or fail to appreciate the importance of the adoption of the principle as such, but it does seem worth while to note exactly where the leaders profess to stand on this absolutely crucial matter.

Disarmament, consultation, and enforcement or sanctions are to be employed with the foregoing ends in view. Again no informed student could quarrel greatly with this, or escape such a conclusion. It is, however, inevitable that certain observers will complain that these are discredited

[2] See documents below, Supplement, p. 2.

League methods while others will gloat over the traditional League methods being admitted as essential to the new world now to be created,—provided that they are seriously and vigorously pressed this time. The main observation to be made by the student who does not care particularly to be involved in that special controversy is that in all three of these matters the lessons of 1919–1939 must be religiously borne in mind: disarmament must either be mutual or be enforced, and probably both; consultation alone is not sufficient to stop aggression or preserve peace; sanctions demand careful and detailed advance organization and prompt and thorough execution;—to mention only a few of the chief items.

By far the most important declaration, of course, is that in favor of a general international organization. This seems to exclude any extreme application of the regional principle, while leaving room for sectional organizations beneath the general system. It provides a possible basis for solution of all the problems mentioned above—or a basis for their possible solution. And it leaves the door open to the creation of entirely new institutions or the utilization of existing institutions for the purpose in view. Here above all the chief criticism to be made of the declarations under consideration is their fragmentary or sketchy character.

For technical students of international law and its administration the persistence of certain leaders and groups among the United Nations along the path of punishment of war crimes promises the most specifically interesting feature of the peace. The subject has been thoroughly discussed in these pages already,[3] and for most observers the solution of the problem will be watched with a mixture of skepticism, not untouched by opposition, and interested hope that in spite of all misgivings the confines of international law and adjudication may be pushed further forward by these bold and somewhat partisan efforts. The statement on this point seems to adopt the solution of the remission of alleged offenders to individual (plaintiff) countries for punishment; no mention is made of any international tribunal, original or appellate and higher offenders not themselves directly guilty of war crimes are referred to very vaguely.

The same is true for the reference to the sovereignty and equality of states. This must probably be regarded as both a niggardly gesture toward international legal principles and also a thinly concealed sop to national prejudice and the debatable attitude taken by certain—not always the "small"—states. It hardly seems necessary to linger over the matter. As a juridical principle sovereignty can be effectively taken care of in international organization by original agreements to accept international authority and its decisions, as has been amply demonstrated now for many years; as an expression of political emotion it can never be wholly quieted. Equality of states is much more difficult to accommodate in a practical working international system but this is not the place to attempt that particular task.

[3] This JOURNAL, Vol. 37 (1943), p. 407.

Perhaps one might suggest to the statesmen that these venerable principles make far more trouble when played up rhetorically than they deserve in their essence and that the less said about them the better.

The declarations concerning the treatment to be meted out to Austria, Italy, and Japan, and concerning the future of Iran and Korea, raise few questions of law or international organization. It is not clear whether the independence of Austria is to be accompanied by a prohibition upon voluntary union with Germany, nor are other aspects of the case (relations with other Danubian states) mentioned. Somewhat greater emphasis is placed on the element of self-determination in the declaration concerning Italy. The proposed liquidation of the Japanese empire hardly rests upon any juridical grounds unless it be a frankly retroactive application of the prohibition on conquest now making its way into the law. The future of Korea is treated as is that of Austria. Finally that of Iran is given a somewhat surprising emphasis until one recalls that this region was once upon a time the theatre of acute Russian-British rivalry. Obviously in all of these cases many issues are left unsettled and even unmentioned; there are many problems still to be solved in these matters.

There is an increased emphasis in these declarations upon ideas of freedom and democracy, coupled with a sharp declaration against intervention. The former element has become fairly commonplace in United Nations literature and may not mean anything in particular here. The latter can hardly be regarded as a pledge to defeated countries and must constitute an attempt to reassure a still suspicious Russia that no counter-revolutionary action against her will be contemplated by other nations as in 1920–1921.

Again the chief comment provoked by these declarations would seem to be that they are very rudimentary and very incomplete. Between them and the thorough, solid, and detailed studies of post-war international relations, economic and political, and of post-war international organization and procedure, which are being made in large numbers in this country and in England,—doubtless also in Russia to some extent,—there is a gap as wide as the sea. Many of these studies are being made, moreover, by official agencies, and even the projects being worked out by private research and study groups are all well known to the public authorities. One certainly could not expect a full picture of the world which they mean to create after the war from the big four or three or two chiefs of state, and their advisers, at this time; what we must do is to remember just how wide the chasm still is between official policy and the complete solution of the problems which will call imperatively for settlement once the end of hostilities is reached.

PITMAN B. POTTER

CURRENT NOTES

MEMBERS OF THE SOCIETY INVITED TO SUGGEST NOMINATIONS FOR OFFICERS

The Committee on Nominations (Messrs. Frederick S. Dunn, Arthur K. Kuhn, Llewellyn Pfankuchen, Pitman B. Potter, and Herbert W. Briggs, Chairman) invites suggestions of nominees for all elective offices to be filled by the American Society of International Law at its Annual Meeting in 1944. According to the Constitution of the Society, these offices are: an Honorary President; a President; Honorary Vice-Presidents; three Vice-Presidents; eight members of the Executive Council in regular term; and one member of the Executive Council to be elected for a two-year term to fill a vacancy. Suggestions should be signed, and mailed to the Chairman of the Committee by March 15, 1944.

HERBERT W. BRIGGS, *Chairman*
Boardman Hall
Cornell University
Ithaca, New York

THE UNIVERSITIES COMMITTEE ON POST-WAR INTERNATIONAL PROBLEMS

The peace settlement following any great war is a most difficult task. No exception to this general condition can be expected at the termination of the present global and totalitarian war. Indeed, the new peace-making may well become the most complex and perplexing of all post-war settlements.

It is not unlikely that the character of the peace settlement of World War II will be profoundly affected by the conclusions reached upon fundamental problems before the end of the conflict by the majority of the American people. In order that these conclusions may be informed and intelligent they must be preceded by wide, patient, methodical and critical examination and discussion of the problems of a more permanent peace.

In this task, American scholars who are not wholly engrossed in military duties have a special and unique opportunity. They are qualified by knowledge, training, and perspective to contribute to the clarification of the crucial issues involved in post-war reconstruction. The formulation and publication of the results of their coöperative study and reflection may have a significant influence on public opinion and on the policy of the Government.

There are many governmental agencies engaged in research on post-war problems, but the results of this research are quite properly surrounded by official secrecy. It is therefore important that private organizations as well as individuals should bring well-considered plans before the American public.

For several years a number of colleges and universities have maintained organizations for the study of international relations. The results of their research are sometimes effectively presented to the public. It is believed,

however, that the activities of such organizations can be made more effective if correlated and presented to the public in a unified pattern. At the same time, colleges and universities that do not maintain research groups in the field of international affairs should be encouraged to undertake these studies and to coöperate in the publication of their findings.

To assist this movement among American scholars the Universities Committee on Post-war International Problems was formed in 1942. A central committee was set up and scholars in all colleges and universities were invited to organize coöperating groups in each of their institutions. At present, there are coöperating groups of scholars in over one hundred colleges and universities throughout the United States. More groups are in the process of being organized.

The institutions in which coöperating groups have already been formed include: Bard College, Bowdoin College, Brown University, Bryn Mawr College, Bucknell University, University of Buffalo, University of California (Berkeley), California Institute of Technology, Carleton College, Catholic University of America, University of Chicago, University of Cincinnati, Clark University, Colby Junior College, Colorado College, University of Colorado, Columbia University, University of Connecticut, Dartmouth College, University of Denver, Emory University, Fordham University, Furman University, University of Georgia, Goucher College, Grinnell College, Hampton Institute, Harvard University, Hobart College, University of Idaho, University of Illinois, John Carroll University, University of Kansas, Knox College, University of Kentucky, Kenyon College, Lawrence College, Long Island University, Loyola College, Loyola University, Macalester College, University of Maryland, Massachusetts State College, Miami University, University of Michigan, Milwaukee-Downer College, Mount Holyoke College, Mundelein College, University of Nebraska, New Jersey College for Women, University of New Mexico, College of New Rochelle, New York University, University of North Carolina, Northeastern University, Northwestern University, Oberlin College, Occidental College, Ohio University, Oklahoma College for Women, University of Oregon, University of Pennsylvania, Princeton University, Principia College, Queens College, Randolph-Macon Woman's College, Rhode Island State College, Rider College, Ripon College, Rockford College, Rollins College, Rutgers College, St. John's University, St. Louis University, Skidmore College, Smith College, University of Southern California, Stanford University, Syracuse University, Temple University, Texas Technological College, Union College, Utah State Agricultural College, University of Vermont, Villanova College, University of Virginia, Washburn Municipal University, University of Washington, Wayne University, Wellesley College, Western Maryland College, West Virginia University, Wheaton College, Whittier College, Wilson College, University of Wisconsin, University of Wyoming and Yale University.

The coöperating groups vary in size from four to sixty-four members, with an average of sixteen. A Central Committee, under the chairmanship of Ralph Barton Perry, assumes the task of correlating the activities of the groups. This committee includes as members: Frank Aydelotte, James Phinney Baxter, 3d, George H. Blakeslee, Ben M. Cherrington, Kenneth Colegrove, Stephen Duggan, Frederick S. Dunn, Edward Mead Earle, Denna F. Fleming, Guy Stanton Ford, Edwin F. Gay, Arthur O. Lovejoy, Charles H. McIlwain, Wallace Notestein, Edwin G. Nourse, C. Reinold Noyes, Jacob Viner, Payson S. Wild, Ernest H. Wilkins, and Quincy Wright. Dr. Leland M. Goodrich serves as Executive-Secretary, with offices in the World Peace Foundation, 40 Mt. Vernon Street, Boston 8, Massachusetts. Correspondence with scholars in making contributions to post-war reconstruction is invited.

To assist in the discussion of problems of post-war international settlement the Central Committee selects and formulates a series of problems in a manner suitable for discussion. The problems thus far selected include: (1) Should the Governments of the United Nations at This Time Formulate and Announce a Common Strategy of Peace? (2) By What Method and Through What Stages Should the Final Peace Settlement be Reached? (3) Treatment of Defeated Enemy Countries—Germany. (4) Should There Be an International Organization for General Security Against Military Aggression, and Should the United States Participate in Such an Organization? (5) Relief and Rehabilitation. (6) International Economic Collaboration. (7) Education and World Peace. (8) Proposed Methods and Agencies for International Economic Collaboration. Should America Participate in Them? (9) Colonies and Dependent Areas. (10) Protection by International Action of the Freedom of the Individual. (11) Bases of Peace in the Pacific Area. (12) Control of Strategic Areas—Land, Water and Air. (13) International Air and Transport. (14) Self-Determination and the Treatment of Minorities. (15) Plans for an International Armed Force. (16) The Role of the Small Powers in the Post-War International System. (17–19) General Character, Powers and Structure of the International Organization. (20) Constitutional Aspects of American Participation in an International Organization.

Discussion of post-war settlement is further assisted by the publication of a Problem Analysis for each of the problems studied by the coöperating groups. These printed pamphlets present many sides of all controversial subjects, without reaching a conclusion. They also contain selected bibliographies on each problem. The reports of the discussions and conclusions of the coöperating groups are carefully summarized and distributed to the members of the groups, to the press, and to Government officials and agencies. It is hoped that this process of focusing the capacities of a large group of American scholars on the problems of post-war settlement will make a contribution to a just and permanent peace.

KENNETH COLEGROVE.

THE NAVICERT IN WORLD WAR II

In view of their favorable experience with the "navicert" during World War I,[1] its revival by the British in December, 1939, occasioned no surprise. The term navicert is derived from the code word "navicert," and in essence is a commercial passport designed to facilitate the passage of consignments through the British blockade. During the first World War the navicert was employed as a feature of a general system inaugurated as a substitute "for the traditional system of visit and search on the high seas." [2] It was applicable only to shipments between neutral countries and its chief advantage for the neutral shipper or consignee was that he knew in advance whether his shipment was likely to be detained *en route* or allowed to pass with a minimum of delay. Pending the issuance or denial of a navicert the shipper or consignee could determine whether or not to insure against the risk of detention.

The navicert system was evolved in Great Britain as a measure to reduce the severity of the comprehensive blockade begun in 1915 to intercept sea borne commodities destined for enemy territory *via* adjacent neutrals. Following the introduction of submarine warfare by the German government in 1915 search and visit operations could no longer be safely conducted at sea and it was necessary to take ships to suitable ports for inspection. Once a neutral ship had been searched by a British patrol, an itemized list of its cargo was forwarded to a special agency known as the Contraband Committee. Upon the latter fell the responsibility of deciding between cargo intended for consumption by neutral countries and that which, though specified for a neutral country, was destined ultimately for enemy consumption. The ensuing hardships to American shippers, such as interminable delays and heavy port charges, prompted Mr. R. P. Skinner, the United States Consul General in London, to offer a plan to the Ministry of Blockade.[3] He proposed that the contents of a ship's cargo be cabled in advance and some arrangement be made to avoid the delay to American vessels. Accordingly a system was worked out and put into operation in March, 1916, which provided for the issuance of letters of assurance (navicerts) by the Trade Department of the British Embassy in Washington. The applications for navicerts were made almost exclusively by telegram, and in a record of April, 1917, approximately a year after the system had been introduced, it was estimated that 40,000 applications had been received of which about 30,000 had been granted.[4] The navicert system continued to operate in the United States until the end of August, 1917, at which time all exports from the country came under the jurisdiction of the United States War Trade Board. Thereafter issuance of navicerts was confined to remaining neutrals.

The British navicert system of World War II was inaugurated on Decem-

[1] Hugh Ritchie, The Navicert System During the World War, Washington, 1938.

[2] This JOURNAL, Vol. 33 (1939), Supplement, p. 508.

[3] Papers Relating to the Foreign Relations of the United States, 1915, Supplement, "The World War," Washington, 1928, pp. 372–373.

[4] Ritchie *op. cit.*, par. 37.

ber 1, 1939, in accordance with the following notice issued by the British Embassy in Washington on November 17, 1939:[5]

"His Majesty's Government in the United Kingdom, while determined to prevent all contraband trade with their enemies, are nevertheless sincerely desirous of reducing to a minimum the interference with neutral trade inevitably occasioned by the exercise of their legitimate belligerent rights. During the war of 1914–1918, the so-called Navicert System was introduced for this purpose with, it is believed, satisfactory results, and His Majesty's Government hereby announce that they intend to re-introduce the Navicert System as from the 1st December, 1939. Initially it will apply to all shipments from the U. S. A. to the following countries:—Belgium, Denmark, Italy, Netherlands, Norway, and Sweden.

"The system will be further extended as opportunity offers.

"For the benefit of exporters and others who are not familiar with the operation of the system, a navicert may be explained as a form of commercial passport. Intending exporters desiring to take advantage of the system may apply to the nearest British Consulate on special forms obtainable from any British Consulate in the U. S. and, if the intended consignment is regarded as unobjectionable, they will be granted a navicert for it. A charge of two dollars will be made for navicerts granted, to cover the cost of the necessary telegraphic enquiries. The navicert must be carried in the same ship as the goods to which it relates, and it will then ensure favourable treatment at the hands of the British contraband patrols. Vessels whose entire cargo is covered by navicerts will be subjected to the minimum of delay.

"As stated above, the system will be inaugurated on December 1st."

On July 30, 1940, the navicert system was extended by an announcement in Parliament that all vessels clearing for Finland, the Baltic States, Sweden, Spain, Portugal, Spanish and International Morocco, Switzerland, Yugoslavia, Hungary, Greece, Bulgaria, Roumania, Turkey, European Russia, and Spanish and Portuguese Atlantic Islands would be liable to seizure if they were not provided with ship navicerts. At this time the warning was reiterated that a shipmaster could obtain a ship navicert from the British Consular Officer at the final port of departure of the vessel only if each individual item was covered by a navicert and if the requirements of the contraband control were complied with in full. Extension of the navicert system continued until by November 18, 1940 twenty countries had been included.[6] These were:

Bulgaria	Reunion
European Russia	Roumania
Finland	Spain
French West Africa	Spanish and Portuguese Atlantic Islands
Greece	Spanish Morocco and Tangier
Hungary	Sweden
Liberia	Switzerland
Madagascar	Turkey
Portugal	Yugoslavia
Portuguese Guiana	

[5] British Embassy Press Release, November 17, 1939.

[6] British Embassy Press Release No. 26, August 2, 1940.

For the convenience of United States shippers navicert applications were accepted by British Consulates in this country for all of the above destinations except Bulgaria, Finland, Hungary, Roumania, and Yugoslavia.[7]

Ordinarily navicerts which were issued were valid for a period of two months. After the system had been in operation for a few months, however, many shippers complained that they were reluctant to commence the manufacture of goods they wished to export until they were reasonably certain that a navicert would issue. To alleviate this uncertainty an optional procedure was offered whereby an applicant for a navicert could state how soon after his application had been provisionally approved he would be ready to ship his goods. If the Ministry of Economic Warfare in London passed favorably on an application a period was set during which the navicert might be claimed. The applicant was free to claim the navicert at any time during the period but its actual issue was subject to confirmation from the Ministry of Economic Warfare in London. This confirmation was usually forthcoming unless "circumstances affecting the consignment" had changed appreciably following approval of the provisional application.[8]

In seeking to make its navicert system for neutral trade airtight the British Government overlooked no loopholes. To prevent financial benefit from accruing to enemy insurance companies applicants for navicerts were required to give the name of the company insuring the consignment after April 25, 1941.[9] Likewise, the same regulations applied for exporters of neutral countries desiring to obtain a British Certificate of Origin and Interest. The latter document issued by the competent British Consulate simply certifies that the exporter of a neutral country has declared that the goods designated on the certificate have not been grown, produced, or manufactured in enemy territory and that no person who is an enemy or with whom trading is prohibited has any interest in the goods exported. Certificates of Origin and Interest have been particularly important in Switzerland and Sweden.[10]

Beginning July 1, 1941, the "mailcert" was introduced as an integral part of the navicert system. The British Embassy in Washington announced that "mailcerts" would be issued to facilitate the passage of United States parcel post and package mail to neutral countries through British Censorship stations. Mailcerts were required for all "parcels, packets and pack-

[7] British Embassy Press Release No. 36, November 15, 1940. Applications for navicerts to Sweden and Finland were required to be made to the Swedish Government Cargoes Clearance Committee and the Finnish American Trading Corporation in New York City.

[8] British Embassy Press Release No. 38, December 11, 1940.

[9] British Embassy Press Release No. 47, March 10, 1941. An "enemy" company was construed as being "a company situated or incorporated in Germany or Italy or other enemy territory or a subsidiary company (in any country) of a company whose principal place of business is in enemy territory, or a company whose name is included in the British Statutory List (list of persons specified as enemies under the Trading with Enemy Act)."

[10] For a discussion of this problem, see Malcolm Moos, "Swiss Neutrality," The Yale Review, Vol. 33 (1943), pp. 131–132.

ages addressed from Continental United States to Erie, Finland, French West Africa, Iran, Iraq, Liberia, Madagascar, Morocco, Portugal, Portuguese Guinea, Portuguese and Spanish Atlantic Islands, Reunion, Spain, Sweden, Switzerland, and Turkey." [11] Any parcel, packet, or package not accompanied by a valid mailcert was subject to detention and possible seizure.

Subsequent to the inclusion of the mailcert under the navicert system the British Government created a quarterly quota system which governed imports into neutral countries. The quotas were assigned to keep shipment of essential domestic commodities for neutral countries at an absolute minimum in order that no surplus would be left for transmission to Axis or Axis-occupied countries. A similar device was used for rationing neutrals in World War I when the British War Trade Statistical Department based quotas for each country on its annual average imports during the three pre-war years to 1913. Allowance was made for "neutral exports, but not for exports to enemy countries, with an addition of some ten per cent for natural increase of population." [12] Since the allotment of quotas to neutrals involves certain political implications no information on this subject is available for World War II. [13]

Perhaps the most unusual aspect of the navicert system as applied to the United States is found in the fact that the Government of this country did not officially recognize navicerts at any time during our neutrality. Quite naturally the Government of the United States reserved all its rights under international law as well as those of its nationals. Therefore, it did not wish to be embarrassed by endorsing any principle of interference with trade of a truly neutral character and the navicert was not accorded official recognition. When the United States entered the war the navicert system was integrated with the United States export licensing under the Board of Economic Warfare. Under the coördinated plan issuance of navicerts by British Consuls in the United States was discontinued on April 1, 1942, and applications for goods to be exported since that date have been received by the Board of Economic Warfare. Export licenses are issued on a quarterly basis and certificates fulfilling the purpose formerly accomplished by ship navicerts are now issued by United States Collectors of Customs. Although the arrangements between the Government of the United States and that of the United Kingdom for coördination of their respective economic warfare measures curtailed use of the navicert in this country the navicert system is still applicable to remaining neutrals.[14]

[11] British Embassy Press Release, June 23, 1941.

[12] Ritchie, *op. cit.*, pars. 30–31.

[13] Personal letter, A. T. Blackwood, British Vice Consul, to Malcolm Moos, Baltimore, Maryland, November 17, 1943.

[14] British Embassy Press Release, February 13, 1942. "The Embassy desires to stress that the foregoing arrangements relate only to United States exports by ship, post, and plane to present navicert countries of destination. In particular the procedure governing

Lack of complete information which necessarily must remain confidential until the termination of the war makes it difficult to evaluate the administration of the navicert at this time. Certainly, however, the imposition of the navicert system in World War II was attended by far less confusion than in World War I. The experience gained during the first World War helped to eradicate many difficulties and, while neutral shippers suffered some hardships during the initial transition period of World War II, when navicert procedures were being regularized, they were mild by comparison with 1916. From the standpoint of a neutral any scheme which restricts its normal commercial intercourse leaves something to be desired, but in terms of expediency few would gainsay the fact that survival in modern war may well hinge on the systematic destruction of the enemy's potential source of supply.[15] Judged by this criteria, the navicert affords a reasonably fair method of regulating neutral shipping.

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POST-WAR PLANNING AND LIMITATION OF SOVEREIGNTY

A considerable number of post-war planners are apparently agreed that some "limitation of sovereignty" is an essential prerequisite for a better post-war world. However, neither the theoretical implications nor the practical consequences of such a step seem sufficiently clear as yet. Hence a brief analysis of the concept of "limitation of sovereignty" with regard to the future of international law and relations might help to clarify the current discussion.

1. Several peace-planners who attack the dogma of absolute sovereignty propose at the same time the reëstablishment of the rule of law in international relations. These planners do not perceive any inconsistency between the two proposals. And yet there is such a contradiction, for international law can be effectively reconstructed only if it is recognized as "supreme" law, superior to any domestic law. International law has to be recognized as absolutely sovereign, in the sense that no rule of law shall be considered as of higher authority than international law.

The lack of clarity on this point is presumably due to the confusion between the sovereignty of international law and the sovereignty of the state. International law is law only if the states, the normal objects of international law, are considered subordinate to it. If, moreover, international law is not only to perform its previous functions but is also to extend its range in the future, the sphere of the supreme or sovereign law must necessarily be

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shipments from Europe to the United States is not affected by the closing down of the navicert system in the United States and remains unchanged."

[15] For a discussion of a different view see this JOURNAL, Vol. 33 (1939), Supplement, p. 815. "It seems clearly improper to suggest that a belligerent should allocate a neutral quota."

enlarged rather than limited. The freedom of individual states to regulate matters without regard for international law, conversely, must be restrained. Yet the limitation of sovereignty of the individual state without the creation of corresponding international rules designed to regulate those matters which customarily belong to the realm of the state would lead to anarchy rather than to international organization.

2. Some students would be ready to qualify their plea for a limitation of sovereignty by confining their demands to a "limitation of national sovereignty." But what is national sovereignty and how can it be limited?

National sovereignty can be defined as the supreme power which operates in the sphere of domestic jurisdiction. Within this sphere every state is authorized by virtue of international law to regulate matters at will.

Now the sphere of domestic jurisdiction is not a rigid entity. It can be limited or it can be expanded. The usual means of bringing about a limitation of national sovereignty is the conclusion of an international agreement designed mutually to delimit the freedom of action of the individual signatories. Specific examples of matters belonging to the sphere of domestic jurisdiction are armaments, immigration, tariffs. It is, no doubt, conceivable that after World War II individual states will be ready to reduce their armaments, to lower existing tariff levels, and to facilitate immigration. But what is really significant from a truly international viewpoint is not the fact that State A, for example, will reduce its armed forces from five million to three million men. The real question at issue is how strong the armed forces of State A are in relation to the armed forces of States B, C, D, and whether State A will permit this relationship to become a matter of international regulation. In other words, the "levels of sovereignty" which should be compared in a realistic appreciation of the limitations of sovereignty are not the internal levels; what really matters is the international ratio of the various national sovereignties.

3. Many advocates of "international federation" suggest the limitation of sovereignty as a prerequisite to that step. On the other hand federation is extolled as the necessary substitute for the League of Nations on the ground that the old League was not strong enough.

Any superficial examination of the various federation proposals suffices to reveal that international federation does not eliminate sovereignty. At best it brings about the transfer of certain customary manifestations of national sovereignty from the member states to the central authority. Thus the power to regulate the currency, international trade, armaments, and the like may be conferred to the federation. Hence sovereignty does not disappear from the political scene; it merely reappears on the federal level in a more concentrated form.

Proponents of international federation occasionally declare that realization of the federal idea will reduce the number of independent states which at present form the family of nations. Thus it is argued that a European

federation, for example, would substitute one political unit for the twenty-seven or thirty-four sovereign European states of 1938. Yet even if a European federation were to be established such a federation would not do away with sovereignty for its central authority would by definition be equipped with some of the traditional attributes of national sovereignty. Accordingly a European federation would by no means eliminate sovereignty as such although it might eliminate several sovereign states. This might or might not be politically desirable.

There is certainly some merit in the argument that abolition of the multiplicity of European states would tend to bring about the end of conflicts among those sovereign power units. Nevertheless an effective contribution to future peace will not flow alone from an intra-European reorganization but will, at least in part, depend upon the prevailing standards concerning the exercise of the sovereignty of European states in relation to extra-European powers.

A genuine world federation, it is true, would end the coexistence of a multiplicity of national sovereignties by monopolizing the essential characteristics of national sovereignty in one supra-state agency. Yet, even here, as in the case of regional federation, the typical features of national sovereignty would not be outlawed since the primary aim of a world federation is the concentration of the customary elements of national sovereignty into the world federation.

4. An international organization which has at its disposal military force sufficient to back up its decisions is another item frequently to be encountered on the agenda of post-war planners. In other words, an international police force is declared to be an essential feature of future international relations. In this connection the strength of the international force in relation to the remaining military might of individual nation states appears to be the decisive factor.

Three alternative ways of organizing military power on an international scale are conceivable. First, exclusive jurisdiction in military matters might be given over to the international system. In this case every state would be required to abandon its individual military sovereignty. Second, international police and national or regional armed forces might coexist side by side. It is evident that in this case the mere establishment of an international police force would not automatically bring about a decrease of military preparations; only a new allocation of military power among international and national military forces would take place and the international police force could effectively contribute to the maintenance of international peace and security only if a clear preponderance of the international over the national forces were established. Third, there might be no separate international police force but a coördinating political or military staff, or both, might be authorized to pool the military power of the individual states in the presence of war, aggression or threat of aggression. In theory the limitation

of national sovereignty in the sense of military strength could most effectively be realized if the individual states would collectively renounce the exercise of military force on their own behalf and would authorize one supranational agency to resort to police action on behalf of the community of nations. It is highly improbable that such a far-reaching transformation of international institutions will be feasible immediately after the cessation of hostilities. The optimum which can reasonably be expected "pending the establishment of a wider and permanent system of general security" (Atlantic Charter, Point 8) will be the coördination of the United Nation forces by a unified command while the individual members of the United Nations still retain, at least in principle, the immediate control over their armed forces. The third alternative, namely the comparatively loose coördination of the conduct of military affairs by several states with a view to the *casus foederis* only, can hardly be considered an adequate machinery to prevent future wars.

In any case the creation of a supranational organization, endowed with a total or partial monopoly of the use of armed force, requires a certain limitation of sovereignty in military matters on the part of the individual members which constitute this organization. It should be clear, however, that any monopoly of military power, notably in an international organization, does not tend to eliminate but rather to create supreme, that is, sovereign, military controls.

5. Since the end of the nineteenth century at least the need for the reduction of armaments has been emphasized time and again by men concerned with the prevention of future wars. Under international law every state has the sovereign right to arm unless it has renounced this right in a special agreement with other powers, but every renunciation of the right to arm constitutes a limitation of "national sovereignty" and unfortunately there is no absolute standard by which to measure general disarmament.

After World War I also general disarmament was held out as a War and Peace Aim. The disarmament clause in Wilson's Fourteen Points could be interpreted as promising equal disarmament for victors and vanquished. In reality the disarmament of the Central Powers was pressed quite far while the military sovereignty of the victors was left intact. In the minds of the German military caste there was never any doubt that Germany's military sovereignty had been curbed through the military clauses of the Treaty of Versailles. The German militarists understood perfectly well that the destruction of the German navy, the demilitarization of the Rhineland, and the provision limiting the German army to 100,000 men meant a severe limitation of sovereignty to them.

By contrast the Atlantic Charter suggests, "pending the establishment of a wider and permanent system of general security," the unilateral disarmament of the aggressor nations. Generally speaking, the actual status of armament or disarmament can reasonably be discussed only in terms of the

relationship of the strongest armed power or powers to the secondary powers. If, at least during the period of transition, the "Big Four"—Great Britain, China, Russia, and the United States—remain in arms, while the Axis Powers are kept disarmed and the smaller United Nations along with the neutral powers are considered more or less negligible from a military viewpoint, this policy will necessarily result in a strengthening of the military sovereignty of the "Big Four" and in a reduction of the military sovereignty of the other powers.

6. In a community of nations organized upon a basis of equality every member would enjoy the same degree of sovereignty. In a community of nations where the principle of hegemony prevails, however, inequality of states is an essential characteristic of the international scene.

As the example of unilateral disarmament shows, limitations of sovereignty are not always put into effect everywhere at the same time. If, for instance, State A succeeds in limiting the sovereign rights of State B without curtailing its own prerogatives under international law, such a technique leads automatically to a relative increase in power of State A with respect to State B. In such a case limitation of sovereignty is not at all equivalent to the end of power politics. One-sided limitations of sovereignty are, on the contrary, designed to strengthen the power positions of States A, B, C and D at the expense of States E, F, G and H. On the whole, a realistic appraisal of the legal significance and the political effects of limitations of sovereignty requires a clarification of the question of who is to limit whose sovereignty and to what extent.

7. Other proposals for the limitation of sovereignty suggest the creation of international or supranational agencies. These legal entities of a higher level than the states are designed to serve as a check against the unfettered freedom of action of individual states.

Even if such agencies are established and function in a satisfactory way, they rarely enjoy sufficient independence from the will of the individual members of the community of nations to achieve a genuine supranational character. Supranational Courts, it is true, are by definition agencies authorized to issue decisions which are binding upon states. Since, however, these Court decisions usually settle individual disputes, and since, furthermore, only a comparatively small number of international disputes are submitted to supranational courts, the actual effect of supranational courts upon the traditional behavior pattern of states in international affairs should not be overestimated.

As regards the so-called international administrative agencies it is often difficult to ascertain whether an individual agency is an international or a supranational body. Action of many of these agencies still frequently presupposes a unanimous vote by the members, subsequent ratification, or both. Hence the limitation of sovereignty brought about by international administrative agencies is often more apparent than real.

Nevertheless international administrative agencies may fulfil many useful functions. In particular, by achieving voluntary coördination of otherwise independent and possibly antagonistic actions, they may in effect limit national sovereignty. Yet such coördination of policies is not always universal in scope and not always directed to peaceful ends; coördination of international action—as in the war-time agencies—primarily designed to direct the combined energies of one power group against another power group does not necessarily imply a limitation of sovereignty but rather a pooling (and possibly an augmentation!) of sovereignties.

The establishment of an international administrative unit is in itself no guarantee for an effective limitation of sovereignties. The degree to which a supranational administrative agency may substitute for domestic administrative action depends upon its structural setup, its underlying policy, and the effectiveness of its work.

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In short, limitation of sovereignty is too complex an issue to be presented in the oversimplified form of a yes-or-no question. Limitation of sovereignty remains an empty generality unless it is explained whose sovereignty is to be limited, by whom, to what extent, and by what means. Granted that limitation of sovereignty is one of the most urgent questions on the agenda of post-war planners, the following items deserve consideration. First, if international lawlessness is to be replaced by universal acceptance of the rule of law in international relations, the individual states' dependence upon international law as the supreme, that is, the sovereign, law is prerequisite. Second, if the world is to be organized as a hegemonial structure through organization of the United Nations under the leadership of the "Big Four"—Great Britain, United States, Russia and China—such a structure will necessitate, as previously indicated, three or four different patterns of sovereignty, at least during the period of transition. Third, if the individual states' sovereignty is to be limited in regard to other entities, the relationship of the individual state to supranational agencies, to other states, and to the private individual should be exactly determined.

HANS AUFRICHT

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16–NOVEMBER 15, 1943

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin *and* Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

July, 1943

25 MIXED COURTS OF EGYPT. Law was promulgated establishing the independence of the judicature. Mixed courts will be abolished in October, 1949. *B. I. N.*, Aug. 7, 1943, p. 700.

August, 1943

5/30/*September* 9 ARGENTINA—UNITED STATES. Texts of Argentine Foreign Minister's note of August 5, requesting lend-lease aid for his country and of Secretary of State Hull's reply of August 30, declining assistance in view of Argentina's lack of co-operation with the United Nations: *D. S. B.*, Sept. 11, 1943, pp. 159–166. Summary and excerpts: *N. Y. Times*, Sept. 8, 1943, pp. 1, 5. Foreign Minister Storni resigned September 9. *N. Y. Times*, Sept. 10, 1943, p. 1.

6/9 CANADA—UNITED STATES. Effected agreement by exchange of notes at Ottawa regarding provincial and municipal taxation on United States defense projects in Canada. *D. S. B.*, Aug. 21, 1943, p. 116. Text: *Ex. Agr. Ser.*, no. 339.

14–25 ROME. Text of Italian statement of August 14 declaring Rome an open city: *N. Y. Times*, Aug. 15, 1943, p. 1. Swiss despatch stated Great Britain and the United States had notified Pope Pius XII of acceptance of the open-city status under certain conditions, including a Vatican guarantee and a Swiss commission to supervise demilitarization. *N. Y. Times*, Aug. 25, 1943, p. 2. Italian radio stated Italy had advised Great Britain and United States of demilitarization steps taken. *C. S. Monitor*, Aug. 24, 1943, p. 2. As of August 25 the United States denied Rome is an open city. *C. S. Monitor*, Aug. 26, 1943, p. 5.

16 PRISONERS OF WAR. Joint statement, issued by the British Foreign Office, the War Office, Colonial Office and General Post Office, accused the Japanese of failing to give regular notification to the British Government of British prisoners' names. *N. Y. Times*, Aug. 17, 1943, p. 17.

17–24 QUEBEC CONFERENCE. President Roosevelt arrived in Quebec on August 17 to confer with Prime Minister Churchill and other military and political leaders of their countries. *N. Y. Times*, Aug. 18, 1943, p. 1. Issued a joint statement which indicated future increased military aid to China. Text: *N. Y. Times*, Aug. 25, 1943, p. 1; *C. S. Monitor*, Aug. 24, 1943, pp. 1, 5; *D. S. B.*, Aug. 28, 1943, p. 121.

18 AUSTRIAN CITIZENSHIP. U. S. Circuit Court of Appeals handed down three decisions bearing on the status of aliens of Austrian origin. The Department of State will be queried on the question of Austrian incorporation into the German Reich in consequence of the decisions. *N. Y. Times*, Aug. 19, 1943, pp. 1, 6.

18/29 SYRIA. M. Shukri Kouatly was elected President of the Syrian Republic on August 18. London *Times*, Aug. 19, 1943, p 3.. Parliamentary elections were held August 29 for the first time since the country was declared independent in November, 1941. *B. I. N.*, Sept. 4, 1943, p. 804.

20 AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN EUROPE. Announcement was made of President Roosevelt's approval of the establishment of the Commission, with Owen J. Roberts as chairman. Members, etc.: *D. S. B.*, Aug. 21, 1943, p. 111.

20 BRAZIL—CHINA. Signed treaty of friendship, cancelling extraterritoriality. *C. S. Monitor*, Aug. 21, 1943, p. 8; *B. I. N.*, Sept. 4, 1943, p. 788.

20 JAPAN—THAILAND. Signed treaty by which certain Malay and Shan states were taken over by Thailand. *B. I. N.*, Sept. 4, 1943, p. 803.

22 CANADA—UNITED STATES. Text of announcement on the creation of a Joint War Aid Committee, and list of members: *N. Y. Times*, Aug. 23, 1943, p. 3.

22/31 WAR CRIMES. On August 22 Turkey announced its reply to the British and United States note of July 31 last, requesting neutral countries to refuse asylum to fugitive Axis criminals. London *Times*, Aug. 23, 1943, p. 4; *B. I. N.*, Sept. 4, 1943, p. 804. The Argentine reply of August 31 stated each case presenting itself would be decided on its individual merits. *C. S. Monitor*, Sept. 1, 1943, p. 4; *N. Y. Times*, Sept. 2, 1943, p. 4; London *Times*, Sept. 2, 1943, p. 3.

23–26 AMERICAN BAR ASSOCIATION. Held annual meeting at Chicago. Heard recommendations for a postwar World Court plan and punishment of Axis war leaders. *N. Y. Times*, Aug. 25, 1943, p. 8; *C. S. Monitor*, Aug. 25, 1943, p. 3. Senator Taft of Ohio warned against an international super-government and Representative Fulbright upheld his resolution in Congress. *N. Y. Times*, Aug. 27, 1943, p. 2.

24/28 ARGENTINA—CHILE. Signed three economic conventions at Buenos Aires. *N. Y. Times*, Aug. 29, 1943, p. 12; London *Times*, Aug. 26 and 30, 1943, pp. 3 and 3; *B. I. N.*, Sept. 4, 1943, p. 786.

26–*October* 12 FRENCH COMMITTEE OF NATIONAL LIBERATION—RECOGNITION. United States, Great Britain, Canada, Soviet Russia, Brazil and Peru granted recognition on August 26. *C. S. Monitor*, Aug. 27, 1943, pp. 7, 8; *N. Y. Times*, Aug. 27, 1943, p. 1. Texts of statements: p. 3. Text of President Roosevelt's statement: *D. S. B.*, Aug. 28, 1943, pp. 125–126. Text of British memorandum in regard to recognition: London *Times*, Aug. 27, 1943, p. 3. Belgium and China granted recognition on August 25 and 26. London *Times*, Aug. 26 and 27, 1943, pp. 3 and 3; *B. I. N.*, Sept. 4, 1943, pp. 788, 791. The Dominican Republic announced its recognition on September 5, and Chile on October 12. *N. Y. Times*, Sept. 6 and Oct. 13, 1943, pp. 5 and 5.

27–*October* 20 ICELAND—UNITED STATES. Signed on August 27 a three-year reciprocal trade agreement at Reykjavik. *D. S. B.*, Aug. 28, 1943, p. 134. Analysis of general provisions and reciprocal benefits: *D. S. B.*, Aug. 28, 1943, pp. 136–142. President Roosevelt's proclamation and the ratification of the Regent of Iceland were exchanged October 20 at Washington. The agreement to enter into force Nov. 19, 1943. *D. S. B.*, Oct. 23, 1943, p. 283.

28–*September* 10 BULGARIA. King Boris III died August 28 at Sofia following a visit to Germany. *N. Y. Times*, Aug. 29, 1943, pp. 1, 12. The Bulgarian Parliament proclaimed Prince Simeon as King on September 3. *C. S. Monitor*, Sept. 3, 1943, p. 7; *N. Y. Times*, Sept. 4, 1943, p. 11. On September 10 a Regency Council of three was appointed. *C. S. Monitor*, Sept. 10, 1943, p. 9; London *Times*, Sept. 11, 1943, p. 3.

29 CANADA—TURKEY. The Turkish Ministry of Foreign Affairs decided to establish an Embassy at Ottawa. *N. Y. Times*, Aug. 30, 1943, p. 3.

30 WAR CRIMES. United States and Great Britain issued declarations of policy concerning "instigators and actual prepetrators" of crimes against civilians in occupied territories. Text of United States declaration: *N. Y. Times*, Aug. 30, 1943, p. 3; *D. S. B.*, Sept. 4, 1943, p. 150. Text of British warning: London *Times*, Aug. 30, 1943, p. 4.•

September, 1943

1 MEXICO—UNITED STATES. United States-Mexican Industrial Commission establishment was announced at Mexico City. *N. Y. Times*, Sept. 2, 1943, p. 7. Personnel: *D. S. B.*, Sept. 4, 1943, p. 155.

3 ITALY (Invasion). British and Canadian troops crossed the Straits of Messina to make a landing on the Italian mainland. *N. Y. Times*, Sept. 3, 1943, p. 1.

3–*October* 13 ITALY. A military armistice was signed September 3 at Syracuse, Sicily [effective September 8]. Announcement was made September 8 of unconditional surrender. Texts of General Eisenhower's communiqué concerning the surrender and Marshal Badoglio's proclamation: *C. S. Monitor*, Sept. 8, 1943, p. 1; *N. Y. Times*, Sept. 9, 1943, p. 1. Armistice terms were approved by the Government of the U.S.S.R. Texts of message to Italian fleet, Instructions to the People, etc.: *N. Y. Times*, Sept. 9, 1943, p. 12. Text of joint message of September 10 from President Roosevelt and Prime Minister Churchill to the Italian people: *D. S. B.*, Sept. 11, 1943, p. 159; *N. Y. Times*, Sept. 11, 1943, pp. 1, 3; *Cong. Record* (daily), Sept. 15, 1943, p. A4112. Summary of armistice terms: *N. Y. Times*, Sept. 12, 1943, pp. 1, 45; *B. I. N.*, Sept. 18, 1943, pp. 825–826. Text: *N. Y. Times*, Sept. 13, 1943, p. 3. Text of the King's proclamation of September 11, urging opposition to German forces: *N. Y. Times*, Sept. 12, 1943, pp. 1, 46. Marshal Badoglio, it was announced on September 20, had ordered Italian forces to fight against Germany. *N. Y. Times*, Sept. 21, 1943, pp. 1, 3. Text of Marshal Badoglio's proclamation of October 13, calling on Italians to assist the United Nations: *D. S. B.*, Oct. 16, 1943, pp. 253–254.

3–*October* 23 WAR DECLARATIONS. Iran declared war on Germany September 9. *N. Y. Times*, Sept. 10, 1943, p. 3; *D. S. B.*, Sept. 18, 1943, p. 180; London *Times*, Sept. 10, 1943, p. 4. Italy declared war on Germany on October 13 London *Times*, Oct. 14, 1943, p. 4; *N. Y. Times*, Oct. 14, 1943, p. 1. On October 23 "Independent India Provincial Government" at Singapore declared war on Great Britain and the United States. *B. I. N.*, Oct. 30, 1943, p. 971.

7–12 SOVIET RUSSIA. Announced officially on September 7 a decision to restore the Holy Synod of the Russian Orthodox Church and to permit election of a Patriarch. *C. S. Monitor*, Sept. 7, 1943, pp. 1, 2. Elected Sergius, Metropolitan of Moscow, as Patriarch on September 8. *N. Y. Times*, Sept. 9, 1943, p. 8; *C. S. Monitor*, Sept. 9, 1943, p. 11. The new Patriarch took office September 12. *N. Y. Times*, Sept. 13, 1943, p. 1.

9 UNITED NATIONS INTERIM COMMISSION ON FOOD AND AGRICULTURE. Chairman announced a draft agreement concerning the obligations of governments to one another had been submitted to the various governments for consultation. *N. Y. Times*, Sept. 10, 1943, p. 15; *C. S. Monitor*, Sept. 11, 1943, p. 4.

10–14 UNITED NATIONS DECLARATION—IRAN. Secretary of State Hull welcomed Iran's decision to declare war and to adhere to the Declaration, thereby becoming the 32d nation to adhere. *N. Y. Times*, Sept. 11, 1943, p. 8. Texts of September 10

notes: *D. S. B.*, Sept. 11, 1943, pp. 166–167. Text of September 13 notes: *D. S. B.*, Sept. 18, 1943, p. 180. Signed by the Minister at Washington on September 14. *N. Y. Times*, Sept. 15, 1943, p. 21.

13/*October* 10 CHINA. Generalissimo Chiang Kai-shek was elected President of China on September 13 to succeed the late Dr. Lin Sen. *N. Y. Times*, Sept. 14, 1943, p. 4. Generalissimo Chiang took an oath of office on October 10. *N. Y. Times*, Oct. 11, 1943, p. 6.

16 CHINA (Nanking)—ITALY. German News Agency announced that the Nanking Government, in coöperation with the Japanese Army, had taken over Italian settlements in Peking, Tientsin, Shanghai, and Hankow, and in Manchukuo the Government took over control of all Italian extraterritorial rights. *B. I. N.*, Oct. 2, 1943, p. 873.

17 MUKDEN INCIDENT. Statement of Secretary of State Hull on the anniversary of the Japanese occupation in 1931: *D. S. B.*, Sept. 18, 1943, p. 179.

20 BRAZIL—UNITED STATES. Signed agreement continuing the lend-lease agreement. *B. I. N.*, Oct. 2, 1943, p. 895.

21 LEBANON. M. Bechara El Khoury was elected President. London *Times*, Sept. 23, 1943, p. 3; *B. I. N.*, Oct. 2, 1943, p. 894.

21 PROPERTY. United States Department of State issued statement regarding possible transfer of property in Italy by concerns in neutral countries acquiring enemy assets in Italy. Text: *D. S. B.*, Sept. 25, 1943, p. 207.

22 CENTRAL AMERICAN REPUBLICS—FRENCH COMMITTEE OF NATIONAL LIBERATION. Announcement was made by the French Committee of the nomination of Dr. Gilbert Medioni as Minister to all Central American Republics. *N. Y. Times*, Sept. 23, 1943, p. 9.

25 FRENCH COMMITTEE OF NATIONAL LIBERATION—UNITED STATES. Signed lend-lease pact at Algiers. *N. Y. Times*, Sept. 26, 1943, p. 41; *B. I. N.*, Oct. 2, 1943, p. 875.

26 ARGENTINA—GREAT BRITAIN. Announced conclusion of two trade agreements. London *Times*, Sept. 27, 1943, p. 4; *N. Y. Times*, Sept. 27, 1943, p. 9. Text of British statement: p. 9.

26/28 MEDITERRANEAN COMMISSION. Russian Foreign Affairs Information Bureau announced appointment of Andrei G. Vishinsky, Vice Commissar of Foreign Affairs as Russia's representative. *N. Y. Times*, Sept. 26, 1943, p. 38. Note on the work of the Commission: *N. Y. Times*, Sept. 29, 1943, p. 11. The United States member is Edwin C. Wilson. *D. S. B.*, Oct. 2, 1943, p. 224. The Commission was formerly known as the Allied Mediterranean Commission. *N. Y. Times*, Oct. 11, 1943, p. 3.

27 ITALIAN (Fascist) RECOGNITION. Japanese Foreign Ministry announced September 27 steps taken for recognition. *B. I. N.*, Oct. 2, 1943, p. 891. German reports of September 29 stated Rumania, Bulgaria, Croatia and Slovakia had recognized the Mussolini Government. *B. I. N.*, Oct. 16, 1943, p. 933. Hungary granted recognition September 29. *N. Y. Times*, Sept. 30, 1943, p. 4; *B. I. N.*, Oct. 16, 1943, p. 933.

27 PRIZES OF WAR. President Roosevelt's proclamation extended to Canada privileges with respect to prizes captured in or brought into the territorial waters of the United States for the use of the Canadian Government. *D. S. B.*, Oct. 2, 1943, p. 224; *N. Y. Times*, Sept. 28, 1943, p. 7.

29 ARMISTICE (Italian). Announcement was made October 29 of the signature [at Syracuse, Sicily], on September 29, of an armistice on political, economic and financial subjects. *N. Y. Times*, Oct. 30, 1943, p. 3; London *Times*, Oct. 30, 1943, p. 4.

29 FRENCH COMMITTEE OF NATIONAL LIBERATION—SWEDEN. Announced completion of a practical arrangement for Swedish relations with the Committee. Relations between Sweden and the Vichy Government would remain unchanged. London *Times*, Sept. 30, 1943, p. 3; *B. I. N.*, Oct. 16, 1943, p. 928.

29 YUGOSLAVIA (in exile). King Peter, Cabinet and Ministers arrived in Cairo to take up residence. London *Times*, Sept. 30, 1943, p. 4; *B. I. N.*, Oct. 16, 1943, p. 927.

29/30 MEXICAN OIL. Mexico and the United States agreed on the manner and conditions of payment of compensation to the United States for the benefit of certain American nationals for losses sustained as a result of the expropriation of their petroleum properties in 1938. Summary: *N. Y. Times*, Sept. 30, 1943, p. 5. Mexico made its first payment September 30 in accordance with notes exchanged the previous day. *N. Y. Times*, Oct. 1, 1943, p. 7; *D. S. B.*, Oct. 2, 1943, pp. 230–231.

October, 1943

6 FRANCE (Vichy)—UNITED STATES. Text of United States documents dealing with relations with the Pétain regime, June 17–Dec. 20, 1940: *N. Y. Times*, Oct. 7, 1943, p. 18; *D. S. B.*, Oct. 9, 1943, pp. 237–243.

9 GREAT BRITAIN—SAUDI ARABIA. Announced exchange of notes by which the Treaty of Jedda, signed May 20, 1927, automatically is renewed "for successive periods of seven years unless either party gives notice of denunciation." London *Times*, Oct. 11, 1943, p. 3; *B. I. N.*, Oct. 16, 1943, p. 936; *N. Y. Times*, Oct. 20, 1943, p. 6.

12–15 AZORES ISLANDS. Prime Minister Churchill announced on October 12 that Portugal had granted Great Britain bases in the Azores. The United States will also have emergency use of the bases. Legal basis for the action is the 1373 treaty of alliance between Great Britain and Portugal. President Salazar's statement emphasized Portuguese determination to maintain its neutral status on the European mainland. *N. Y. Times*, Oct. 13, 1943, pp. 1, 8; London *Times*, Oct. 13, 1943, p. 4. Germany and Japan protested formally October 14 and 15. *B. I. N.*, Oct. 30, 1943, p. 973.

12–22 PAN AMERICAN DEMOGRAPHIC CONGRESS. Conference on immigration convened at Mexico City. *N. Y. Times*, Oct. 14, 1943, p. 9. United States delegation: *D. S. B.*, Oct. 2, 1943, p. 232. Announced formation of a Pan American Demographic Committee to correlate statistics and to study immigration and migration problems. *N. Y. Times*, Oct. 23, 1943, p. 5. Text of resolutions adopted: *Mexico News* (Mexico City), Nov. 15, 1943, pp. 5, 7–8.

13 BELGIUM (in exile)—LUXEMBURG (in exile)—NETHERLANDS (in exile). Announced a monetary pact, pegging the rate of exchange between the guilder and the franc. Summary: London *Times*, Oct. 22, 1943, p. 3. Text of joint statement: *Knickerbocker Weekly* (N. Y.), Nov. 1, 1943, p. 4. Text of agreement: pp. 31–32. Excerpts: *Netherlands News* (N. Y.), Oct. 11/25, 1943, pp. 316–318.

13 GERMANY—ITALY. Italy declared war on Germany and was accepted as a co-belligerent by Great Britain, Russia and the United States. *N. Y. Times*, Oct. 14, 1943, p. 1; London *Times*, Oct. 14, 1943, p. 4. Texts of three documents: *D. S. B.*, Oct. 16, 1943, pp. 253–254.

14 FINLAND—UNITED STATES. Announced agreement whereby Finland will increase its war-debt payments by more than $42,000 a year for twenty years in order to overtake a two-year lapse due to the Russo-Finnish war. *N. Y. Times,* Oct. 15, 1943, p. 11.

14/15 HAITI. President Elie Lescot arrived October 14 in Washington, and addressed the Congress October 15. *D. S. B.*, Oct. 16, 1943, p. 264. Text of address: *Cong. Record* (daily), Oct. 15, 1943, pp. 8474–8475.

15 UNITED NATIONS DECLARATION—ALBANIA. Text of King Zog's statement on Albania's requests for acceptance as one of the United Nations: *N. Y. Times*, Oct. 16, 1943, p. 4.

15–21 JAPAN—UNITED STATES. Exchanged nationals at Gôa, Portuguese India. *D. S. B.*, Oct. 16, 1943, pp. 255–256.

16 ETHIOPIA—ITALY. Ethiopia refused to recognize Italy as a cobelligerent. *N. Y. Times*, Oct. 16, 1943, p. 5.

16–*November* 7 UNITED NATIONS COMMISSION FOR THE INVESTIGATION OF WAR CRIMES. Jan Maarten de Moor was named Dutch member. *N. Y. Times*, Oct. 17, 1943, p. 39. Representatives of 17 countries agreed October 20 upon final plans for the immediate establishment of the Commission in London. London *Times*, Oct. 21, 1943, p. 4; *B. I. N.*, Oct. 30, 1943, p. 965. Punishment of war crimes' perpetrators will be supervised by the Commission, according to announcement of November 7 from London. *N. Y. Times*, Nov. 8, 1943, p. 7.

19 GREAT BRITAIN—SOVIET RUSSIA—UNITED STATES. Announced signature in London of a third protocol for lend-lease assistance from the United States, Great Britain and Canada to Russia. *N. Y. Times*, Oct. 20, 1943, p. 7; *D. S. B.*, Oct. 23, 1943, pp. 272–273; London *Times*, Oct. 20, 1943, p. 4.

19–30 MOSCOW CONFERENCE. Secretary of State Hull, Foreign Minister Eden and Foreign Commissar Molotov conferred at the Kremlin. *N. Y. Times*, Oct. 20, 1943, p. 1. Texts of joint declarations on Italy and Austria, continuation of the war and postwar collaboration and statement on atrocities: *N. Y. Times*, Nov. 2, 1943, p. 14; London *Times*, Nov. 2, 1943, pp. 3, 4; *Cong. Record* (daily), Nov. 1, 1943, pp. 9025–9026; *D. S. B.*, Nov. 6, 1943, pp. 307–311; *International Conciliation* (N. Y.), December, 1943, pp. 599–606. It was decided to set up in London a European Advisory Commission to study European questions as they arise. The declarations have the same force as treaties, according to Department of State officials. *N. Y. Times*, Nov. 3, 1943, p. 5.

20 BELGIUM (in exile)—CHINA. Signed treaty in Chungking whereby Belgium relinquished extraterritorial and other rights in China. *B. I. N.*, Oct. 30, 1943, p. 958.

21 CREMIEUX DECREE. French Committee of National Liberation indorsed the Cremieux Decree which gave Algerian Jews French citizenship rights in 1870. *C. S. Monitor*, Oct. 22, 1943, pp. 1, 2; *N. Y. Times*, Oct. 22, 1943, p. 11.

29 GERMANY—VATICAN. Berlin and Vatican radios announced special German pledge of the Pope's safety. *N. Y. Times*, Oct. 30, 1943, p. 3.

November, 1943

1 WORLD WAR. Alignment of the nations in the war: *D. S. B.*, Nov. 20, 1943, pp. 349–356; 361–372. Map: pp. 358–359.

3 PALESTINE. War Economic Board, consisting of 1 Briton, 4 Arabs, 4 Jews and the British Secretary, was set up to coördinate the work in various fields of civilian effort. *N. Y. Times*, Nov. 4, 1943, p. 3.

3/9 FRENCH PROVISIONAL CONSULTATIVE ASSEMBLY. General de Gaulle opened first meeting. *N. Y. Times*, Nov. 4, 1943, p. 3. Felix Gouin was named presiding officer on November 9. *N. Y. Times*, Nov. 10, 1943, p. 10.

4 ALBANIA. In a speech in the House of Commons Prime Minister Churchill pledged a free Albania. *N. Y. Times*, Nov. 5, 1943, p. 3. Text: London *Times*, Nov. 5, 1943, p. 8.

4 POISON GAS. The Chinese Government charged Japanese use of poison gas. *N. Y. Times*, Nov. 5, 1943, pp. 1, 8.

9 UNITED NATIONS. List of 33: *D. S. B.*, Nov. 13, 1943, p. 317.

9–13 UNITED NATIONS RELIEF AND REHABILITATION ADMINISTRATION. Representatives of 44 United Nations and associated nations signed agreement at the White House on November 9 for the establishment of the organization. *N. Y. Times*, Nov. 10, 1943, pp. 1, 3–4; *D. S. B.*, Nov. 13, 1943, pp. 335–336. Text of draft agreement: *N. Y. Times*, Sept. 24, 1943; *D. S. B.*, Sept. 25, 1943, pp. 211–216. The Council opened sessions November 10 at Atlantic City. *N. Y. Times*, Nov. 11, 1943, p. 5. Elected Herbert H. Lehman Director General on November 11. *N. Y. Times*, Nov. 12, 1943, p. 1. Committees on (1) general policy; (2) finance and supplies; (3) relief and rehabilitation policies; (4) organization and administration, started their work on November 13. *N. Y. Times*, Nov. 14, 1943, p. 43.

10 ALLIED CONTROL COMMISSION FOR ITALY. General Eisenhower announced formation of the Commission which will carry out the armistice terms and align Italy's resources and manpower in support of the United Nations. Text of announcement: *N. Y. Times*, Nov. 11, 1943, p. 5; London *Times*, Nov. 11, 1943, p. 3.

10 OPIUM. Text of United States Department of State announcement of the decision by Great Britain and The Netherlands to prohibit the use of opium for smoking and to abolish opium monopolies in their territories when they shall be freed from Japanese occupation: *D. S. B.*, Nov. 13, 1943, pp. 331–332.

11/19 CANADA—UNITED STATES. Agreed to raise their legations to the rank of embassies. *N. Y. Times*, Nov. 12, 1943, p. 23; *D. S. B.*, Nov. 13, 1943, p. 334. U. S. Ambassador presented his letters of credence November 19. *N. Y. Times*, Nov. 20, 1943, p. 1.

11/21 LEBANON. Following vote by the Chamber of Deputies for full sovereignty and independence, the President, Premier and other members of the Government were arrested by the French Delegate General of the French Committee of National Liberation. Under the new law the French Committee would have no voice in what should be discussed in the Lebanese Chamber; the Lebanese would have their own flag and Arabic would be the one recognized State language. *N. Y. Times*, Nov. 12, 1943, pp. 1, 6; *C. S. Monitor*, Nov. 12, 1943, pp. 1, 2. Reinstatement of President Khoury and release of several Ministers was ordered November 21 by the French Committee. *N. Y. Times*, Nov. 22, 1943, pp. 1, 6.

14 ATLANTIC CHARTER—EGYPT. Premier Mustapha Nahas Pasha announced Egypt's decision to joint nations adhering to the principles of the Atlantic Charter. *N. Y. Times*, Nov. 15, 1943, p. 6. Text of communications of November 20 and 27, exchanged by the Egyptian Minister and Secretary of State Hull: *D. S. B.*, Nov. 27, 1943, p. 382.

JUDICIAL DECISIONS

ex parte REPUBLIC OF PERU

SUPREME COURT OF THE UNITED STATES*

[April 5, 1943.]

Claim of a friendly foreign state of title to a vessel which has been seized by U. S. district court under a libel *in rem* in a private litigation, the claim having been recognized by the Department of State and certified to the court, is ground for immunity to the jurisdiction and remission of parties to diplomatic channels; immunity not waived by appearance of the Republic of Peru in the litigation for purpose of defending its interests, immunity being continuously asserted.

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a motion for leave to file in this Court the petition of the Republic of Peru for a writ of prohibition or of mandamus. The petition asks this Court to prohibit respondent, a judge of the District Court for the Eastern District of Louisiana, and the other judges and officers of that court, from further exercise of jurisdiction over a proceeding *in rem*, pending in that court against petitioner's steamship *Ucayali*, and to direct the district judge to enter an order in the proceeding declaring the vessel immune from suit. The questions for decision here are whether this Court has jurisdiction to issue the writ, whether such jurisdiction should in our discretion be exercised in petitioner's behalf, and whether petitioner's appearance and defense of the suit in the district court was, as that court has ruled, a waiver of its claim that the vessel, being that of a friendly sovereign state, is immune from suit brought by a private party in the court of the United States.

On March 30, 1942, Galban Lobo Co., S. A., a Cuban corporation, filed a libel in the district court against the *Ucayali* for its failure to carry a cargo of sugar from a Peruvian port to New York, as required by the terms of a charter party entered into by libelant with a Peruvian corporation acting as agent in behalf of the Peruvian Government. On April 9, 1942, the Republic of Peru, acting by the master of the vessel, intervened in the district court by filing a claim to the vessel, averring that the Republic of Peru was sole owner, and stating: "The filing of this claim is not a general appearance and is without prejudice to or waiver of all defenses and objections which may be available to respondent and claimant, particularly, but not exclusively, sovereign immunity."

On the same day petitioner procured the release of the vessel by filing a surety release bond in the sum of $60,000, on which petitioner was principal. The bond, which contained a reservation identical with that appearing in petitioner's claim to the vessel, was conditioned upon payment of any amount awarded to libelant by the final decree in the cause. On April 11th

* No. 13, October Term, 1942; 318 U. S. 578.

petitioner proceeded in the cause to take the testimony of the master on the merits, and spread on the record a statement that the testimony was taken with like "full reservation and without waiver of all defenses and objections which may be available to respondent claimant, particularly, but not exclusively, sovereign immunity." Petitioner also stated that "the appearance of counsel for the Government of Peru and the Steamship *Ucayali* is for the special purpose only of taking the testimony of the master under the reservation aforesaid."

On April 18th, and again on May 10th and on May 29th, petitioner moved for and obtained an order of the district court extending its time within which to answer or otherwise plead to the libel. Each motion was made "with full reservation and without waiver of any defenses and objections which may be available to mover, particularly, but not exclusively, sovereign immunity."

In the meantime petitioner, following the accepted course of procedure (see *Ex parte Muir*, 254 U. S. 522; *The Navemar*, 303 U. S. 68), by appropriate representations, sought recognition by the State Department of petitioner's claim of immunity, and asked that the Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney for the Eastern District of Louisiana to file in the district court the appropriate suggestion of immunity of the vessel from suit. These negotiations resulted in formal recognition by the State Department of the claim of immunity. This was communicated to the Attorney General by the Under Secretary's letter of May 5, 1942. The letter requested him to instruct the United States Attorney to present to the district court a copy of the Ambassador's formal claim of immunity filed with the State Department, and to say that "this Department accepts as true the statements of the Ambassador concerning the steamship *Ucayali*, and recognizes and allows the claim of immunity."

Pursuant to these instructions the United States Attorney, on June 29th, filed in the district court a formal statement advising the court of the proceedings and communications mentioned, suggesting to the court and praying "that the claim of immunity made on behalf of the said Peruvian Steamship *Ucayali* and recognized and allowed by the State Department be given full force and effect by this court"; and "that the said vessel proceeded against herein be declared immune from the jurisdiction and process of this court." On July 1st petitioner moved for release of the vessel and that the suit be dismissed. The district court denied the motion on the ground that petitioner had waived its immunity by applying for extensions of time within which to answer, and by taking the deposition of the master—steps which the district court thought constituted a general appearance despite petitioner's attempted reservation of its right to assert its immunity as a defense in the suit. — F. Supp. —.

The first question for our consideration is that of our jurisdiction. Section

13 of the Judiciary Act of 1789, 1 Stat. 81, conferred upon this Court "power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." And § 14 provided that this Court and other federal courts "shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Stat. 81. These provisions have in substance been carried over into §§ 234 and 262 of the Judicial Code (28 U. S. C. §§ 342, 377), and § 751 of the Revised Statutes (28 U. S. C. § 451).

The jurisdiction of this Court as defined in Article III, § 2, of the Constitution is either "original" or "appellate." Suits brought in the district courts of the United States, not of such character as to be within the original jurisdiction of this Court under the Constitution are cognizable by it only in the exercise of its appellate jurisdiction. Hence its statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction. *Marbury* v. *Madison*, 1 Cranch 137, 173–80; *Ex parte Siebold*, 100 U. S. 371, 374–75.

Under the statutory provisions, the jurisdiction of this Court to issue common law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so. Such has been the office of the writs when directed by this Court to district courts, both before the Judiciary Act of 1925, 43 Stat. 936,[1] and since.[2] In all these cases (cited in notes 1 and 2), the appellate, not the original, jurisdiction of this Court was invoked and exercised.[3]

[1] E.g., Ex parte State of New York, No. 1, 256 U. S. 490; The Western Maid, 257 U. S. 419; Ex parte Simons, 247 U. S. 231; Ex parte Peterson, 253 U. S. 300, 305; Ex parte Hudgings, 249 U. S. 378; Ex parte Uppercu, 239 U. S. 435; Matter of Heff, 197 U. S. 488; Ex parte Siebold, 100 U. S. 371; Ex parte Watkins, 3 Pet. 193; United States *v.* Peters, 3 Dall. 121.

[2] Ex parte United States, 287 U. S. 241; Maryland *v.* Soper (No. 1), 270 U. S. 9, 27–28; Maryland *v.* Soper (No. 2), 270 U. S. 36; Maryland *v.* Soper (No. 3), 270 U. S. 44; Colorado *v.* Symes, 286 U. S. 510; McCullough *v.* Cosgrave, 309 U. S. 634; Ex parte Kawato, 317 U. S. 69; see Los Angeles Brush Corp. *v.* James, 272 U. S. 701.

[3] See particularly the discussion in Maryland *v.* Soper (No. 1), 270 U. S. 9, 28–30, and in Ex parte United States, 287 U. S. 241. Compare Ex parte Siebold, 100 U. S. 371.

Ex parte United States, *supra*, was not and could not have been a case of original jurisdiction. The Constitution confers original jurisdiction only in cases affecting ambassadors, other public ministers and consuls, and "those in which a State shall be Party" (Art. III,

The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95–96; *Ex parte City of Monterey*, 269 U. S. 527; *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 29; *United States* v. *Dern*, 289 U. S. 352, 359, and are usually denied where other adequate remedy is available. *Ex parte Baldwin*, 291 U. S. 610. And ever since the statute vested in the circuit courts of appeals appellate jurisdiction on direct appeal from the district courts, this Court, in the exercise of its discretion, has in appropriate circumstances declined to issue the writ to a district court, but without prejudice to an application to the circuit court of appeals (*Ex parte Apex Mfg. Co.*, 274 U. S. 725; *Ex parte Daugherty*, 282 U. S. 809; *Ex parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533), which likewise has power under § 262 of the Judicial Code to issue the writ. *McClellan* v. *Carland*, 217 U. S. 268; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269.

After a full review of the traditional use of the common law writs by this Court, and in issuing a writ of mandamus, in aid of its appellate jurisdiction, to compel a district judge to issue a bench warrant in conformity to statutory requirements, this Court declared in *Ex parte United States*, 287 U. S. 241, 248–49: "The rule deducible from the later decisions, and which we now affirm, is, that this Court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this Court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this Court as the court of ultimate review only in such exceptional cases." [4]

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§ 2, cl. 2). No state was made a party to Ex parte United States. The United States has never been held to be a "State" within this provision—and it obviously is not—nor has it any standing to bring an original action in this Court which does not otherwise come within one of the provisions of Article III, § 2, cl. 2. United States *v.* Texas, 143 U. S. 621, relied upon to sustain a different view, was within the original jurisdiction because the state of Texas was the party defendant. And until now it has never been suggested that necessity, however great, warrants the exercise by this Court of original jurisdiction which the Constitution has not conferred upon it. Moreover, even if Congress had withdrawn this Court's appellate jurisdiction by the 1925 Act, there would have been no necessity in Ex parte United States for inventing an original jurisdiction which the Constitution had withheld, since a writ of mandamus could have been applied for in the circuit court of appeals.

[4] The suggestion that the Judiciary Act of 1925 was intended to curtail the jurisdiction previously exercised by this Court in granting such writs to the district courts finds no support in the history or language of the Act. The Act was originally prepared by a committee of justices of this Court, by whom it was submitted to Congress for consideration. Four members of this Court gave testimony before Congressional committees in explanation of the purposes and meaning of the Act, and Chief Justice Taft submitted a detailed statement of

We conclude that we have jurisdiction to issue the writ as prayed. And we think that—unless the sovereign immunity has been waived—the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit court of appeals, from which it might be necessary to bring the case to this Court again by certiorari. The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State. When the Secretary elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries

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the changes which the Act would effect. These disclose that the great purpose of the Act was to curtail the Court's obligatory jurisdiction by substituting, for the appeal as of right, discretionary review by certiorari in many classes of cases. In all the oral and written submissions by members of this Court, and in the reports of the committees of Congress which recommended adoption of the bill, there is not a single suggestion that the Act would withdraw or limit the Court's existing jurisdiction to direct the common law writs to the district courts when, in the exercise of its discretion, it deemed such a remedy appropriate. [See Résumé, together with Citations Affecting Sections of Senate Bill 3164, submitted by Chief Justice Taft, printed for use of Senate Committee on the Judiciary, 67th Cong., 2d Sess.; Hearing on S. 2060 and S. 2061, before a Subcommittee of the Senate Committee on the Judiciary, Feb. 2, 1924, 68th Cong., 1st Sess.; Hearing on H. R. 8206 before House Committee on the Judiciary, Dec. 18, 1924, 68th Cong., 2d Sess.; S. Rep. No. 362, 68th Cong., 1st Sess.; H. Rep. No. 1075, 68th Cong., 2d Sess.] The changes in existing law proposed to be made by the Act were set forth with painstaking detail. It is hardly conceivable that the justices of this Court, fully familiar with its practice, would have left unexpressed an intention—had such intention really existed—to curtail drastically a jurisdiction which the Court had exercised under statutory authority from the beginning of its history. Ex parte United States, and most of the other cases cited in note 2, *supra*, were decided at a time when members of the Court's committee responsible for the 1925 Act were still members of the Court. The Court's unanimous concurrence in the existence of its jurisdiction in the cases subsequent to the 1925 Act establishes a practice (cf. Stuart *v.* Laird, 1 Cranch 299, 309) which would be beyond explanation if there had been any thought that any provision of the Act had placed such a restriction on the Court's jurisdiction to issue the writs.

Nor can it be said that this legislative history gives any support to the suggestion that the failure of the 1925 Act to cut off the jurisdiction of this Court to issue the common law writs to district courts was inadvertent, and that the Act should therefore be construed as though it had done what it failed to do. The jurisdiction of this Court to issue such writs, like its jurisdiction to grant certiorari, is discretionary. The definite aim of the 1925 Act was to enlarge, not to destroy, the Court's discretionary jurisdiction. That aim can hardly give rise to an inference of an unexpressed purpose to amend or repeal the statutes of the United States conferring jurisdiction on the Court to issue the writs, or an inference that such would have been the purpose had repeal been proposed. The exercise of that jurisdiction has placed no undue burden on this Court. It is significant that, since 1925, less than ten of the numerous applications to this Court for such writs have been granted. Only in rare instances has their denial been the occasion for an opinion dealing with questions of public importance. See, e.g., Los Angeles Brush Corp. *v.* James, 272 U. S. 701; Ex parte Baldwin, 291 U. S. 610; Ex parte Colonna, 314 U. S. 510; cf. Mooney *v.* Holohan, 294 U. S. 103. And whatever the scope of the jurisdiction of this Court, in no case does it decline to examine an application in order to determine whether it has jurisdiction.

rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court. If the Republic of Peru has not waived its immunity, we think that there are persuasive grounds for exercising our jurisdiction to issue the writ in this case and at this time without requiring petitioner to apply to the circuit court of appeals, and that those grounds are at least as strong and urgent as those found sufficient in *Ex parte United States*, in *Maryland* v. *Soper*, in *Colorado* v. *Symes*, and in *McCullough* v. *Cosgrave*, all *supra*, note 2. We accordingly pass to the question whether petitioner has waived his immunity.

This case presents no question of the jurisdiction of the district court over the person of a defendant. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance or participation in the litigation. Here the district court acquired jurisdiction *in rem* by the seizure and control of the vessel, and the libelant's claim against the vessel constituted a case or controversy which the court had authority to decide. Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for such immunity existed—whether the vessel when seized was petitioner's, and was of a character entitling it to the immunity. See *Ex parte Muir*, *supra; The Pesaro*, 255 U. S. 216; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562; *The Navemar*, *supra*. Therefore the question which we must decide is not whether there was jurisdiction in the district court, acquired by the appearance of petitioner, but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law.

That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *United States* v. *Lee*, 106 U. S. 196, 209. More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune. When such a seizure occurs the friendly foreign sovereign may present its claim of immunity by appearance in the suit and by way of defense to the libel. *The Navemar*, *supra*, 74 and cases cited; *Ex parte Muir*, *supra*. But it may also present its claim to the Department of State, the political arm of the Government charged with the conduct of our foreign affairs. Upon recognition and allowance of the claim

by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations. *The Navemar, supra*, 74; *The Exchange*, 7 Cranch 116. This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.

We cannot say that the Republic of Peru has waived its immunity. It has consistently declared its reliance on the immunity, both before the Department and in the district court. Neither method of asserting the immunity is incompatible with the other. Nor, in view of the purpose to be achieved by permitting the immunity to be asserted, are we able to perceive any ground for saying that the district court should disregard the claim of immunity, which a friendly sovereign is authorized to advance by way of defense in the pending suit, merely because the sovereign has seen fit to preserve its right to interpose other defenses. The evil consequences which might follow the seizure of the vessel are not any the less because the friendly state asserts other grounds for the vessel's release.

Here the State Department has not left the Republic of Peru to intervene in the litigation through its Ambassador as in the case of *The Navemar*. The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause. We have no occasion to decide whether the court should surrender the vessel and dismiss the suit on certification of sovereign immunity by the Secretary, made after the friendly sovereign has once unqualifiedly assented to a judicial determination of the controversy.

The motion for leave to file is granted. We assume that, in view of this opinion, formal issuance of the writ will be unnecessary, and we direct that the writ issue only on further application by the petitioner.

Mr. Justice ROBERTS concurs in the result.

Mr. Justice FRANKFURTER, dissenting.

If due regard be had for its aims, the Judiciary Act of 1925, 43 Stat. 936, denies us, in my opinion, the power to review the action in this case of the District Court for the Eastern District of Louisiana, even though such review is cast in form of a writ of prohibition or of mandamus. But, even assuming

we have discretionary power to issue such writs to a district court, we should in the circumstances of this case abstain from exercising that power in view of the absence of any showing that relief equally prompt and effective and consonant with the national interest was not, and is not, available in the appropriate Circuit Court of Appeals.

The range of cases that may be brought here directly from the district courts and the rigor with which we limit our discretionary jurisdiction determine the capacity of this Court adequately to discharge its essential functions. I shall therefore briefly state the grounds for believing that this case is improperly here, that the rule should be discharged, and the motion for leave to file the petition be denied. I put to one side the relation of the Peruvian Ambassador to this litigation. This is not a proceeding falling under the rubric "Cases affecting Ambassadors" and thereby giving us original jurisdiction. My brethren do not so treat it, and our common starting point is that in taking hold of this case the Court is exercising its appellate jurisdiction.

We are also agreed that this Court "can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress." *Amer. Const. Co.* v. *Jacksonville Railway*, 148 U. S. 372, 378. Had this case arisen under the Evarts Act (Act of March 3, 1891, 26 Stat. 826), appeal could have been taken from the district court, since its jurisdiction was in issue, directly to this Court without going to the Circuit Court of Appeals. See, *e.g.*, *Wilson* v. *Republic Iron Co.*, 257 U. S. 92. And since the case would have been within the immediate appellate jurisdiction of this Court, §§ 13 and 14 of the first Judiciary Act, 1 Stat. 73, 80–82 (now 28 U. S. C. §§ 342, 377, 451), would have authorized this Court to issue an appropriate writ to prevent frustration of its appellate power, see *Exparte Crane*, 5 Pet. 190, or have enabled it to accelerate its own undoubted reviewing authority where, under very exceptional circumstances, actual and not undefined interests of justice so required. Compare *In re Chetwood*, 165 U. S. 443; *Whitney* v. *Dick*, 202 U. S. 132; *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269.

The power to issue these auxiliary writs is not a qualification or even a loose construction of the strict limits, defined by the Constitution and the Congress, within which this Court must move in reviewing decisions of lower courts. There have been occasional, but not many, deviations from the true doctrine in employing these auxiliary writs as incidental to the right granted by Congress to this Court to review litigation, in aid of which it may become necessary to issue a facilitating writ. The issuance of such a writ is, in effect, an anticipatory review of a case that can in due course come here directly. When the Act of 1891 established the intermediate courts of appeals and gave to them a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court, the philosophy and practice of federal appellate jurisdiction came under careful scrutiny. This Court uniformly

and without dissent held that it was without power to issue a writ of mandamus in a case in which it did not otherwise have appellate jurisdiction. *In re Massachusetts*, 197 U. S. 482, and *In re Glaser*, 198 U. S. 171. In these cases rules were discharged because, under the Circuit Courts of Appeals Act, appeals could not be brought directly to the Supreme Court but would have to go to the Circuit Court of Appeals, and only thereafter could they come here, if at all, through certiorari. But review could be brought directly to this Court of cases in which the jurisdiction of the district court was in issue, and therefore writs of "prohibition or mandamus or certiorari as ancillary thereto," *In re Massachusetts, supra* at 488, were available. Cases which came here directly, prior to the Judiciary Act of February 13, 1925, 43 Stat. 936, to review the jurisdiction of the district courts, whether on appeal or through the informal procedure of auxiliary writs, are therefore not relevant precedents for the present case.

The Judiciary Act of 1925 was aimed to extend the Court's control over its business by curtailing its appellate jurisdiction drastically. Relief was given by Congress to enable this Court to discharge its indispensable functions of interpreting the Constitution and preserving uniformity of decision among the eleven intermediate courts of appeals. Periodically since the Civil War—to speak only of recent times—the prodigal scope of the appellate jurisdiction of this Court brought more cases here than even the most competent tribunal could wisely and promptly adjudicate. Arrears became inevitable until, after a long legislative travail, the establishment in 1891 of intermediate appellate tribunals freed this Court of a large volume of business. By 1916 Congress had to erect a further dam against access to this Court of litigation that already had been through two lower courts and was not of a nature calling for the judgment of the Supreme Court. Act of September 6, 1916, 39 Stat. 726. But the increase of business—the inevitable aftermath of the Great War and of renewed legislative activity—soon caught up with the meager relief afforded by the Act of 1916. The old evils of an overburdened docket reappeared. Absorption of the appellate jurisdiction of the Supreme Court by cases that should have gone to, or been left with, the circuit court of appeals resulted in unjustifiable subordination of the national interests in the special keeping of this Court. To be sure, the situation was not as bad as that which called the circuit courts of appeals into being. In the eighties three to four years elapsed between the docketing and the hearing of a case. But it was bad enough. In 1922 Chief Justice Taft reported to Congress that it took from fifteen to eighteen months for a case to reach argument.

The needless clog on the Court's proper business came from two sources. More than a dozen classes of cases could have a second review in the Supreme Court, as a matter of right, after an unsuccessful appeal in the circuit courts of appeals. With a single exception all adjudications by the circuit courts of appeals were by the Act of 1925 made reviewable only by the discretionary

writ of certiorari. But no less prolific a source of mischief in the practical application of the appellate jurisdiction of the Supreme Court prior to the Act of 1925, was the right to bring cases directly to this Court from the district courts. According to the figures submitted to Congress in support of the need for the 1925 legislation, one-sixth of the total business of the Supreme Court came directly from the district courts. (Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate, 68th Cong., 1st Sess., on S. 2060 and S. 2061, pp. 32–33, 44–45.) Most of these cases presented phases of the general question now before us, namely, the right of a district court to adjudicate. The obvious remedy for this unwarranted direct review of courts of first instance was to shut off direct access from the district courts to this Court. That is exactly what was proposed. In the language of the chief spokesman before the judiciary Committees, "Section 238 as amended and reënacted in the bill would permit cases falling within four particular classes, and those only, to come from the district courts directly to the Supreme Court. . . . Apart from cases within these four classes, the bill provides that the immediate review of all decisions in the district courts shall be in the circuit courts of appeals. We regard this as the better course and calculated to promote the public interest." *Ibid.*, 33–34. This conception of "the public interest" was translated into law, except that in one additional class of cases direct review was allowed from the district courts to this Court. Suffice it to say that the five accepted categories are not in serious derogation of the wise requirement that review of action by the district courts belongs to the circuit courts of appeals. All five either involve litigation before a district court composed of three judges, or ordinarily touch matters of national concern.

The present power of this Court to review directly dicisions of district courts must be determined by the restrictions Congress imposed in the Act of 1925. The language of that section is significant:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, *and not otherwise*. . . ." (43 Stat. 936, 938—italics provided.)

This case does not fall even remotely within any of these five Acts.[1] We

[1] "SEC. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

"(1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

"(2) The Act of March 2, 1907, 'providing for writs of error in certain instances in criminal cases' where the decision of the district court is adverse to the United States.

"(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is

have thus been given no appellate jurisdiction over this controversy, but by resort to so-called ancillary writs we are exercising appellate jurisdiction here. On principle, it is still as true as it was held to be in *In re Massachusetts, supra,* and *In re Glaser, supra,* that "in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus . . . as ancillary thereto." 197 U. S. 482, 488. This does not imply that by indirection the Act of 1925 repealed what were originally §§ 13 and 14 of the Judiciary Act of 1789, on which, in their present form in the United States Code (28 U. S. C. §§ 342, 377, 451), the Court relies. The new distribution of appellate jurisdiction between the Supreme Court and the circuit courts of appeals did not repeal these old provisions. It does, however, call for restriction of their application in harmony with this new distribution. Ancillary writs are still available both for the circuit courts of appeals and this Court when they may in fact be ancillary to a main suit. See *Ex parte Kawato,* 316 U. S. 650, 317 U. S. 69, 71 (leave to file petition for writ of mandamus granted after such leave was denied by the Circuit Court of Appeals); and *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269. But when we cannot have jurisdiction in a case on appeal, no proceeding can be ancillary to it.

I am not unmindful that the hearings on the Judiciary Act of 1925 before the Committees of Congress are completely silent regarding the appellate jurisdiction of this Court through use of ancillary writs. But it would not be the first time in the history of judiciary legislation that eminent jurisdictional authorities and expert draftsmen, preoccupied with major problems in a large scheme for relieving this Court of undue business, have been forgetful of minor aspects of jurisdiction. For instance, it took six years to deal with the implications overlooked by Senator Evarts in using the phrase "infamous crimes" in the Act of 1891. (See *In re Claasen,* 140 U. S. 200, and H. Rep. No. 666, 54th Cong., 1st Sess., the letter of Chief Justice Fuller to Senator Hoar in 23 Cong. Rec. 3285–86, Report of Attorney General Olney for 1893, xxv, and the Act of January 20, 1897, 29 Stat. 492.) Legislation by even the most competent hands, like other forms of composition, is subject to the frailties of the imagination. Concentration on the basic aims of a reform

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hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'

"(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

"(5) Section 316 of 'An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products, and eggs, and for other purposes' approved August 15, 1921." 43 Stat. 936, 938.

like the Act of 1925 inevitably overlooks lacunae and ambiguities which the future reveals and which the future must correct. The Act of 1925, despite its deft authorship, soon revealed such ambiguities. See the series of cases collected in *Phillips* v. *United States*, 312 U. S. 246, 250–51. They were resolved by faithful enforcement of the central purpose of the Act of February 13, 1925, which was "to keep within narrow confines our appellate docket," 312 U. S. at 250. For more than half a century the desire of Congress to cut down the appellate jurisdiction of this Court has been given effect in a variety of situations even though Congress did not adequately express such purpose. See, for instance, *McLish* v. *Roff*, 141 U. S. 661; *Robinson* v. *Caldwell*, 165 U. S. 359; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277; *American Security Co.* v. *Dist. of Columbia*, 224 U. S. 491; *Inter-Island Steam Nav. Co.* v. *Ward*, 242 U. S. 1.

Finally, it is urged that practice since the Judicial Act of 1925 sanctions the present assumption of jurisdiction. Cases like *Ex parte Northern Pac. R. Co.*, 280 U. S. 142, ordering a district judge to summon three judges to hear a suit under § 266 of the Judicial Code (28 U. S. C. § 380), must be put to one side. This is one of the excepted classes under the Act of 1925 in which direct review lies from a district court to the Supreme Court, and it is therefore an orthodox utilization of an ancillary writ within the rule of *In re Massachusetts, supra.* Of all the other cases in which, since the Act of 1925, a writ was authorized to be issued, none is comparable to the circumstances of the present case. In one, *Ex parte Kawato, supra,* the appellate jurisdiction of this was invoked only after it was denied by a circuit court of appeals. Another, *Ex parte United States*, 287 U. S. 241, while in form a review of action by a district court, was in fact an independent suit by the United States because no appeal as such lay from the refusal of the district judge in that case to issue a bench warrant in denial of his duty. If the suit was a justiciable controversy through use of the ancillary writ, it was equally justiciable if regarded as an original suit by the United States. While, to be sure, it was not formally such, and while an ordinary suit by the United States to enforce an obligation against one of its citizens properly cannot be brought within the original jurisdiction of this Court, *Ex parte United States, supra,* was quite different. There the United States sought enforcement of a public duty for which no redress could be had in any other court. Therefore, the considerations which led this Court in *United States* v. *Texas*, 143 U. S. 621, to allow the United States to initiate an original suit in this Court, although the merely literal language of the Constitution precluded it (as the dissent in that case insisted), might have been equally potent to allow assumption of such jurisdiction in the circumstances of *Ex parte United States.* But, in any event, merely because there is no other available judicial relief is no reason for taking appellate jurisdiction. For some situations the only appropriate remedy is corrective legislation. Of the same nature were four other cases, three suits by Maryland and one by Colorado. *Maryland* v. *Soper* (1), 270

U. S. 9; *Maryland* v. *Soper* (2), 270 U. S. 36; *Maryland* v. *Soper* (3), 270 U. S. 44; *Colorado* v. *Symes*, 286 U. S. 510. These cases were not ordinary claims by a state against one of its citizens for which the state courts are the appropriate tribunals, see *California* v. *Southern Pacific Co.*, 157 U. S. 229. They were in effect suits by states against federal functionaries in situations in which the citizenship of these functionaries was irrelevant to the controversy. And so the considerations that made the controversies by Maryland and Colorado justiciable through ancillary writs might have been equally relevant in establishing justiciability for original suits in this Court under Article III, Section 2. It is not without significance that the *Maryland* v. *Soper* cases and *Colorado* v. *Symes*, which the Court now regards as precedents for the ruling in *Ex parte United States*, were not even referred to in the opinion in the latter case.

If *Ex parte United States*, the *Maryland* v. *Soper* cases, and *Colorado* v. *Symes*, *supra*, are not to be supported on the basis of their peculiar circumstances which might have justified the Court in assuming jurisdiction, they should be candidly regarded as deviations from the narrow limits within which our appellate jurisdiction should move. They would then belong with the occasional lapses which occur when technical questions of jurisdiction are not properly presented to the Court and consciously met. That leaves two other cases, *Los Angeles Brush Corp.* v. *James*, 272 U. S. 701, and *McCullough* v. *Cosgrave*, 309 U. S. 634. In the *Los Angeles Brush* case, the Court explicitly refused to invoke authority to issue an ancillary writ inasmuch as the appellate jurisdiction of the controversy belonged to the Circuit Court of Appeals and not to this Court. The case concerned "the enforcement of the Equity Rules," 272 U. S. at 706, and the power which this Court recognized in that case was part of the duty imposed upon the Court by Congress to formulate and put in force the Equity Rules. The *McCullough* case was equally restricted. It merely followed the *Los Angeles Brush* case in enforcing the Equity Rules.

To be sure, *Ex parte United States*, *supra*, stated that later cases had qualified *In re Massachusetts* and *In re Glaser*, *supra*. But the cases that were avouch (*McClellan*, v. *Carland*, 217 U. S. 268; *Ex parte Abdu*, 247 U. S. 27) in no wise called into question *In re Massachusetts* and *In re Glaser*, and the actual decisions left them intact. The authority of *In re Massachusetts*, *supra*, and *In re Glaser*, *supra*, was unquestioned as late as 1923, in *Magnum Co.* v. *Coty*, 262 U. S. 159, after, that is, the cases referred to in *Ex parte United States*, *supra*, as having limited *In re Massachusetts* and *In re Glaser*. The essence of the Act of 1925 was curtailment of our appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions. It is hardly consonant with this restrictive purpose of the Act of 1925 to enlarge the opportunities to come to this Court beyond the limit recognized and enforced under the Act of 1891—that there can be no ancillary jurisdiction where the litigation on the merits could not directly come here for re-

view. In only one of the cases since the Act of 1925 in which the ancillary writs were invoked in situations in which this Court did not have direct appellate jurisdiction, did counsel call to the attention of this Court the bearing of the Act of 1925 upon the power to issue ancillary writs and the relevance of cases prior to that Act, and in no case did this Court apparently address itself to the problem now canvassed. Authority exercised *sub silentio* does not establish jurisdiction. Throughout its history it has been the firm policy of this Court not to recognize the exercise of jurisdiction under such circumstances as precedents when the question is first sharply brought for decision. *United States* v. *More*, 3 Cranch 159, 172; *Snow* v. *United States*, 118 U. S. 346, 354–55; *Cross* v. *Burke*, 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, 236; *Arant* v. *Lane*, 245 U. S. 166, 170.

In deciding whether to give a latitudinarian or a restricted scope to the appellate jurisdiction of this Court, the important factor is the number of instances in which applications for the exercise of the Court's jurisdiction has been or may be made, not the number of instances in which the jurisdiction has been exercised. And so it tells little that less than ten applications for mandamus have been granted since the Act of 1925. What is far more important is that merely for the first seven Terms after that Act not less than seventy-two applications for such writs were made. Every application consumes time in consideration, whether eventually granted or denied.

Had the Court jurisdiction, this case would furnish no occasion for its exercise. On whatever technical basis of jurisdiction the availability of these writs may have been founded, their use has been reserved for very special circumstances. However varying the language of justification, these ancillary writs have been issued only to further some imperative claim of justice. In the present case, the upshot of these proceedings is to circumvent the intermediate appellate court as the natural and normal resort for relief from a claim of want of jurisdiction in the district court.

No palpable exigency either of national or international import is made manifest for seeking this extraordinary relief here. For all practical purposes the litigation has ceased to concern a vessel belonging to a sister republic. While, to be sure, the legal issues turn on the claim of sovereign immunity by Peru in a vessel libeled in an American harbor, the ship has long since been released and the actual stake of the controversy is a bond. Thus the case for our intervention, to the disregard of the Circuit Court of Appeals, cannot be put higher than the propriety of vindicating the dignity of a friendly foreign state.

But surely this is to introduce the formal elegancies of diplomacy into the severe business of securing legal rights through the judicial machinery normally adapted for the purpose. After all, if the framers of the Constitution had deemed litigation in this Court alone to comport with appropriate regard for the dignity of a friendly foreign state, they would have given this Court original jurisdiction in such cases. If our nearest neighbors wished to litigate

in this country, they could not bring suit in this Court. See *Monaco* v. *Mississippi*, 292 U. S. 313. It is not deemed incompatible with the dignity of the United States itself to begin suit in a district court, have the litigation proceed to the circuit court of appeals, and only by our leave reach this Court. See, *e.g.*, *United States* v. *California*, 297 U. S. 175. Litigation involving the interests of the United States in ships owned by it has twice recently gone through this normal process, and it will not be thought that the dignity of the United States was thereby compromised. Indeed, under the arrangements made by Congress in 1925, measures deemed indispensable for the conduct of the war could be nullified by district courts and could not come here for review until appeal was duly taken to the circuit courts of appeals. To be sure, Congress has wisely provided that once such an appeal is filed this Court in its discretion may bring the appeal here. See, *e.g.*, *White* v. *Mechanics Securities Corp.*, 269 U. S. 283; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 294–95; *Ex parte Quirin*, 317 U. S. 1, 19–20. To require a foreign state to seek relief in an orderly fashion through the circuit court of appeals can imply an indifference to the dignity of a sister nation only on the assumption that circuit courts of appeals are not courts of great authority. Our federal judicial system presupposes the contrary. Certainly this Court should in every possible way attribute to these courts a prestige which invites reliance for the burdens of appellate review except in those cases, relatively few, in which this Court is called upon to adjudicate constitutional issues or other questions of national importance.

To remit a controversy like this to the circuit court of appeals where it properly belongs is not to be indifferent to claims of importance but to be uncompromising in safeguarding the conditions which alone will enable this Court to discharge well the duties entrusted exclusively to us. The tremendous and delicate problems which call for the judgment of the nation's ultimate tribunal require the utmost conservation of time and energy even for the ablest judges. Listening to arguments and studying records and briefs constitute only a fraction of what goes into the judicial process. For one thing, as the present law reports compared with those of even a generation ago bear ample testimony, the types of cases that now come before the Court to a considerable extent require study of materials outside the technical law books. But more important, the judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions.

It is therefore imperative that the docket of the Court be kept down, that no case be taken which does not rise to the significance of inescapability for the responsibility entrusted to this Court. Every case that is allowed to

come here which, judged by these standards, may well be left either to the state courts or to the circuit courts of appeals, makes inroads upon thought and energy which properly belong to the limited number of cases which only this Court can adjudicate. Even a judge of such unique gifts and experience as Mr. Justice Holmes felt at the very height of his powers, as we now know, the whip of undue pressure in his work. One case is not just one case more, and does not stop with being just one more case. Chief Justice Taft was not the last judge who, as he said of himself, "having a kind heart, I am inclined to grant probably more [discretionary reviews] than is wise." (Hearing before the Committee on the Judiciary, House of Representatives, 68th Cong., 2d Sess., on H. R. 8206, p. 27.)

In a case like this, we should deny our power to exercise jurisdiction. But, in any event, we should refuse to exercise it. By such refusal we would discourage future applications of a similar kind, and thereby enforce those rigorous standards in this Court's judicial administration which alone will give us the freshness and vigor of thought and spirit that are indispensable for wise decisions in the causes committed to us.

Mr. Justice Reed is of the opinion that this Court has jurisdiction to grant the writ requested, *Ex parte United States*, 287 U. S. 241, but concurs in this dissent on the ground that application for the writ sought should have been made first to the Circuit Court of Appeals.

THE GLENROY *

GREAT BRITAIN: PROBATE, DIVORCE AND ADMIRALTY

[Lord Merriman, P., August 26, 1943.]

An alien enemy has the right of appearance in the Prize Court if his claim is based on an international treaty or convention or some other immunity recognized by the law of nations enabling him to sustain a *persona standi in judicio*. Otherwise he must obtain the licence of the Crown to entitle him to be heard, even if he does not assert any right to the release of the subject-matter of his claim but merely resists its condemnation. The Prize Court itself has no discretion to allow an alien enemy to prosecute his claim.

Dictum as to the discretion of the Court in *The Pomona* (59 *The Times* L. R. 111) not followed.

Dicta in *V/O Sovfracht* v. *N. V. Gebr van Udens Scheepvaart en Agentuur Maatschappij* (59 *The Times* L. R. 101; [1943] A. C. 203) discussed and explained.

The affidavits required to be filed under order 2, r. 22, and order 3, r. 5, of the Prize Court Rules, 1939, by an enemy alien should state the capacity in which the deponent purports to speak and should disclose the basis of the claimant's assertion of *persona standi in judicio*.

* 60 Times Law Reports 8.

A consignment of beans shipped by a Japanese company in July, 1939, in a British ship, to Hamburg, was seized as prize when the ship was diverted to Liverpool after the outbreak of war with Germany. After Japan entered the war a controller was appointed by the Board of Trade to wind up the London branch of the Japanese company. He entered an appearance and filed a claim on behalf of himself, as controller, and also on behalf of the London branch and the company in Japan.

Held, that the controller had a *locus standi* to prosecute his claim on behalf of the London branch without further authority, but that, so far as the claim related to the company in Japan, he must obtain some authority from the Crown to entitle him to be heard.

By this summons, taken out by the Procurator-General, the following preliminary points were raised: (a) Whether in any, and what, circumstances a claimant who, according to municipal law, was an enemy, required specific authority from the Crown to enable him to prosecute his claim in a Court of Prize in this country; (b) whether on the facts of the case the claimant required any further or other authority to prosecute his claim than he had already obtained; and in either case (c) what practice should be prescribed to regulate the procedure in this connexion.

The Attorney-General (Sir Donald Somervell, K. C.) and Mr. J. V. Nesbitt appeared for the Procurator-General, and Sir Robert Aske, K. C., and Mr. Robert Gething for the claimant.

THE PRESIDENT, in the course of a considered judgment, said: At the outbreak of the war with Germany the Glenroy, of the Port of Liverpool, was in course of a voyage from Hong-kong and other ports to Hamburg *via* London. Included in her cargo were 2,240 bags of beans, consigned by the Otaru branch of the Mitsui Bussan Kabushiki Kaisha, a company incorporated in Japan (hereinafter called the Mitsui Company), to a branch office carrying on business at Hamburg, under a contract dated July 11, 1939. After the outbreak of war the Glenroy was diverted to Liverpool. On November 2, 1939, the beans were seized in prize.

The writ was issued on November 16, 1939. On December 18, 1939, within the time appointed by the rules, an appearance was entered for Mitsui and Company, Limited, as owners of the beans. Mitsui and Company, Limited (hereinafter called the London branch) is the branch office in the United Kingdom of the Mitsui Company, and is registered as such under sections 343 and 344 of the Companies Act, 1929. It is not an English company and was not, before the entry of Japan into the war, a legal entity, either under the Companies Act or at common law. By the combined effect of section 3 (2) and section 7 (1) (*d*) (iii) of the Trading with the Enemy Act, 1939, the Defence (Trading with the Enemy) Regulations, 1940, and section 3A (1) (*a*) added to the Act, and to the regulations by Order in Council, 1289 of 1940, a Mr. Spencer, a chartered accountant, was, after Japan

had become a belligerent, appointed controller of the London branch to supervise the carrying out of a "restriction order" within the meaning of the section last mentioned, and by a winding-up order is now controlling and supervising the winding-up of the branch.

On March 2, 1943, an appearance was entered on his behalf as controller of the London branch, and on March 12, 1943, he filed the claim which it is conceded he is now to be taken as putting forward in the winding-up. The significance of this is that, in relation to the Trading with the Enemy legislation in force during the last war, it was settled that, for the purposes of winding-up, such an undertaking as the London branch became a legal entity apart from the parent enemy company, though the winding-up order applies only to the assets and liabilities of the branch business: *In re W. Hagelberg Aktien-Gesellschaft* ([1916] 2 Ch. 503) and *In re Th. Goldschmidt, Limited* ([1917] 2 Ch. 194). In the present war Mr. Justice Bennett has held that these decisions apply to the trading with the enemy legislation now in force; that a winding-up order made thereunder must be held to create, for the purpose of winding-up, a new entity—namely, the business ordered to be wound up; and that this entity is considered as one which can possess assets and have liabilities of its own: *In re Banca Commerciale Italiana* ((1943) 59 *The Times* L. R. 231).

On July 23, 1940, the London branch obtained an order for the release to them of the goods on a bail bond to cover their value. Mr. Nesbitt admitted that, if and so far as these goods were, at the material time, assets of the London branch, the claimant has, without the necessity of obtaining any further licence or authority from the Crown, the right to be heard on his claim on behalf of the London branch, and none the less so that, as between themselves and the Mitsui Company, the London branch may ultimately be liable to account to that company: see *Continho Caro and Company* v. *Vermont and Company* (33 *The Times* L. R. 461; [1917] 2 K. B. 587). He contended, however, that, if the ownership in the goods was in the Mitsui Company to the exclusion of the London branch, the claimant would have no authority whatever to be heard on behalf of the Mitsui Company. Apart from the point that the claimant has in no way been appointed to represent the Mitsui Company as distinct from the London branch, Mr. Nesbitt based this contention on two grounds; first, that on the facts deposed to in the claimant's affidavit in support of his claim it is clear, in accordance with the principles laid down in the authorities which I am about to discuss, that the Mitsui Company can sustain no *persona standi in judicio;* and, secondly, that they must therefore obtain some licence or authority from the Crown to entitle them to be heard.

The claim is made by the claimant in his capacity as controller of the London branch on behalf of himself as such controller and also on behalf of the branch and the Mitsui Company, "the true, lawful, and sole owners of the beans," and for such losses, costs, charges, damages, and expenses as have

arisen or may arise by reason of the said seizure. The grounds of the claim are that the controller, branch, or company is the sole owner of the beans, and that they were shipped from Japan before the declaration of war, and were not at any material time contraband or liable to be treated as such, or liable to seizure or condemnation on any other ground. Mr. Gething suggested that it was necessary to plead the alleged interest of the Mitsui Company in these terms in order accurately to define the nature of the claim; but this, so he argued, was a mere matter of form. He was, however, obliged to admit that, on the face of the claim, the claimant would be enabled to make any part of the claim on behalf of the Mitsui Company.

It is indisputable that a Prize Court in this country is bound by any enactment of the Legislature governing its procedure. If, for example, Parliament chose to enact that in no circumstances should any enemy, or any particular class of enemies, be allowed to make or prosecute a claim in prize, or should only be allowed to do so subject to certain restrictions, and the enactment destroyed or curtailed rights recognized as settled by the law of Prize heretofore administered in this country, this Court would nevertheless be bound by the enactment. It is equally clear, however, that in so far as those rights were destroyed or curtailed the Court would not, *pro tanto*, be administering the law of nations as that law has been interpreted by the Prize Courts of this country: see *The Zamora* (32 *The Times* L. R. 436; [1916] 2 A. C. 77). No such enactment is here in question, but it is obvious that these preliminary questions have arisen for decision because of certain observations in the House of Lords in *V/O Sovfracht* v. *N. V. Gebr. van Udens Scheepvaart en Agentuur Maatschappij* (59 *The Times* L. R. 101; [1943] A. C. 203). But that case dealt solely with the municipal law; any references, however weighty, to prize law must be taken as having been made for the sole purpose of elucidating the actual subject-matter of the decision, and therefore, in relation to a Prize Court, are *obiter dicta*. While this Court must be scrupulously careful to observe any municipal law by which it is bound, concerning the right of audience of an enemy, it is important that the Court should not impose any unwarranted restriction of such right, more particularly as this country already restricts such right within narrower bounds than are set by many other Powers.

It is necessary, therefore, to ascertain what are the principles by which a Prize Court in this country is governed in this respect. I will begin by referring to the Prize Court Rules, 1939. The rules at present in force were made by his Majesty in Council under the authority of the Prize Courts Act, 1894. By order 2, rule 22, where a writ is issued on the application of an alien enemy, an affidavit shortly stating the grounds of the claim must be filed in the Registry before the writ is issued; and by rule 5 of order 3 (which deals with appearances and claims), it is provided that an alien enemy shall, before entering an appearance, file in the Registry an affidavit stating the grounds of his claim. It was suggested in the course of the argument that,

as these rules have the authority of his Majesty, no other authority is needed to entitle an enemy to prosecute a claim. I do not think that this can be so. It seems clear that the requirement that an alien enemy before entering an appearance must state on oath the grounds of his claim is intended to enable the Court to decide whether the grounds are such as to entitle him to be heard on his claim. • A reference to the argument in *The Chile* (1 Ll. Rep. Prize Cas. 8, at p. 31, *et seq.*) shows plainly that Sir Samuel Evans, P., was of this opinion. Moreover, the President held in that case that the affidavit was wholly insufficient to entitle the owners to appear and struck out the appearance entered in their behalf, while expressly leaving undecided the general question whether they had any right to appear.

That brings me to an examination of the authorities. In *The Hoop* ((1799) 1 Ch. Rob. 196, at p. 200) Lord Stowell said: "In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. The peculiar law of our country applies this principle with great rigour. The same principle is received in our Courts of the law of nations; they are so far British Courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. But otherwise he is totally *ex lex*."

In Pratt's edition of Story (1854) a licence and a treaty are added to the list of things suspending a claimant's hostile character.

In *The Panaja Drapaniotisa* ((1856) Spinks P. C. 337) Dr. Lushington examined the usual form of claim and affidavit then in use and said: "The principle is this: that to support a claim in the Prize Court the individual asserting his claim must first show that he is entitled to a *locus standi*. No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore, to prevent deception which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral States resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims. He must describe the place to which he belongs, and he must negative all enemy's interest in a form specially framed for that purpose, and intended to apply, to all intents, to any person resident within the territories of the enemy, to whatever country he may happen to owe allegiance. The excepted cases are where an enemy merchant claims under an Order in Council, or licence, and then, of necessity, the form is altered and the ground of the special claim inserted. The form of the affidavit has been altered from time to time, according to the States with which Great Britain was at war. Originally it excluded only persons resident in France; as the war became extended, it was altered to

affect the subjects of other countries declared to be at war with Great Britain."

I do not think that, in referring only to an Order in Council or a licence, Dr. Lushington could have intended to exhaust the sources from which the suspension of an enemy's hostile character might be derived. It may be assumed that he was thinking particularly of the Order in Council, in force during the Crimean war, giving six weeks' grace to enemy ships. The point is that unless the enemy could show that he could sustain a *persona standi in judicio*, by virtue of something which suspended his enemy character *pro hac vice*, it was settled law both during the Napoleonic and the Crimean wars that he had no right to be heard, and it was equally well settled that in his absence the sentence of condemnation would be completely valid as well against him as against the whole world: *The Falcon* ((1805) 6 Ch. Rob. 194, at p. 199) and Pratt's edition of Story, at p. 111.

These principles were recognized and adopted by Sir Samuel Evans in 1914 in *The Marie Glaeser* (31 *The Times* L. R. 8; [1914] P. 218). Early in the last war, however, a difficult question arose in connexion with Hague Convention No. VI. By article 1 of this convention it was laid down that, when a merchant ship belonging to one of the belligerent Powers was at the commencement of hostilities in an enemy port, it was desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. And by article 2 a merchant ship which, owing to circumstances beyond its control, might have been unable to leave the enemy port within the period contemplated in the preceding article, or was not allowed to leave, might not be confiscated. The belligerent might merely detain it on condition of restoring it after the war without payment of compensation, or he might requisition it on condition of paying compensation. This convention substituted for the weeks of grace allowed during the Crimean war a pious expression of the desirability of allowing days of grace, coupled with a prohibition against condemnation, and a provision for the ultimate release of the ship or compensation as the case might be. But when an order in this sense was made in *The Chile* (31 *The Times* L. R. 3; [1914] P. 212) neither the question of the binding character of Convention VI, nor the question of the *locus standi* of an enemy relying on article 2 thereof was expressly decided.

The latter point arose for decision, and the former was assumed, in *The Möwe* (31 *The Times* L. R. 46; [1915] P. 1). Sir Samuel Evans stated that the first question which arose for decision was whether the owner, admittedly an enemy subject and the owner of an enemy ship, had a right to appear as a claimant in the proceedings, or whether he should be given such a right in order to assert whatever privileges he deemed to be conferred on him by the Sixth Hague Convention. After again reviewing the authorities to the more important of which I have already referred, Sir Samuel Evans paraphrased

the claimant's position under the Hague Convention No. VI in these terms (31 *The Times* L. R., at p. 48; [1915] P., at p. 11): "I admit that I am an alien enemy; and therefore that my ship was lawfully captured and seized as being enemy property; but I wish to appear to put forward and argue my claim that in the circumstances of my case the ship is not confiscable and cannot be condemned; but can only be detained during the war, to be restored to me after the war." Sir Samuel Evans adopted this paraphrase in order to make it clear that he understood himself to be engaged in extending the existing law. It seems to me to be very much to the purpose to consider why his decision to hear claimants who relied on Convention No. VI, was regarded as an extension, and how Sir Samuel Evans justified making the extension. It was an extension because the enemy admittedly remained an enemy and was not able to assert that his hostile character was suspended *pro hac vice*. This plainly appears on the face of the judgment, but if there were any doubt about it his observations in the course of the argument in *The Chile*, as reported in 1 Ll. Prize Cas. pp. 37 to 41, would make the point clear. The justification for the extension raises a more difficult question. In *The Möwe* (31 *The Times* L. R., at p. 48; [1915] P., at p. 14) Sir Samuel Evans appears to be laying down in the widest possible terms that the matter was not one of international law, but of the practice of the Court.

On the strength of this passage I was invited to hold that in this matter the Court is restricted only by its own discretion, and that it is open to me to give an unrestricted right of audience to any enemy claimant. I am bound to say that if this were the true interpretation of Sir Samuel Evans' judgment I should find some difficulty in following it, more particularly as so wide a claim derives no support from decisions of the Privy Council, which expressly or impliedly approve of the actual decision in *The Möwe* (*supra*). But I do not think that this is the true effect of Sir Samuel Evans' judgment. Every judgment must be read in the light of the subject-matter. The subject-matter in that case was that the enemy claimant was indeed relying on an international treaty which prohibited condemnation and provided for the ultimate restoration of his property, though it did not suspend his enemy character. But, after all, the suspension of enemy character is a purely notional conception. It may have greater or less substance according to the circumstances of the case. Manifestly it would have greater substance in the case of an alien enemy to whom, for the benefit of this country, a licence to trade had been accorded, as not infrequently happened during the Napoleonic wars, while it might have much less substance in the case of a ship allowed to depart within the days of grace, with the possible result that her subsequent activities would be inimical to this country. It was, no doubt, for this reason among others that the immunity from condemnation conferred by article 2 of convention No. VI was substituted for the right to days of grace. The real contrast, therefore, appears to be between complete immunity from capture coupled with the fiction that the hostile character is

suspended, and mere immunity from condemnation coupled with the reality that the hostile character remains. This is suggested by the following passage of the judgment (31 *The Times* L. R., at p. 48; [1915] P., at p. 13):

> "Having premised so much, I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under The Hague Conventions, assuming, as was done during the argument, that they are operative. Under some of the conventions some degree of protection and relief is given in respect of vessels which are not wholly immune from capture at sea or seizure in ports, for example, under the sixth convention the consequences of seizure or capture are minimised and limited in certain cases, although complete immunity is not afforded. Under others of the conventions some vessels are entirely exempted from capture. For instance, under the tenth convention, hospital ships are free from capture, except in certain specified circumstances; and under the eleventh convention certain coast fishing vessels and local trading boats, as well as those employed on religious, scientific, or philanthropic missions, are similarly exempted. With regard to vessels comprised within the tenth and eleventh conventions, the cases which might arise would approach nearly to those of vessels which came within the protection afforded by the Order in Council of 1854. Dealing with The Hague Conventions as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise."

It is in this context that Sir Samuel Evans said: "Mr. Holland argued that this is a matter not of international law, but of the practice of this Court. That view is correct. I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned. Moreover, by order 45 of the Prize Court Rules, 1914, it is laid down that in all cases not provided for by these rules, the practice of the late High Court of Admiralty in England in Prize proceedings shall be followed, or such other practice as the President may direct. The rules do not provide for the case now arising. I therefore assume that as President of this Court I can give directions as to the practice *in such cases as that with which the Court is now dealing.*"

I emphasize these last words.

The justice and convenience of making the extension, if indeed it should truly be regarded as an extension, are obvious, and received the approval of the Privy Council in the cases to which I shall refer. But no such question arises here, and I am not prepared to deduce from the passage quoted above an unfettered discretion to extend indiscriminately the *locus standi* of enemy aliens. In effect, the decision in *The Möwe* (*supra*) seems to me to be an excellent example of the exception proving the rule.

It must be admitted, however, that this view of the matter conflicts with that expressed in *The Gutenfels* ((1915) 1 B. and C. P. C. 102). In that case

the Prize Court for Egypt, sitting at Alexandria, held that this enemy vessel, which had been detained on the outbreak of war at Port Said and had been escorted out to sea and there seized as prize, by a British cruiser, must be considered to have been captured in a belligerent port. The Court allowed the claimant to appear to argue that his vessel was protected from capture by the rules of international law or by an international convention. Mr. Justice Cator, presiding, dealt with this preliminary question (at pp. 104 to 106 of his judgment), founding himself on Sir Samuel Evans' judgment in *The Möwe* (*supra*), and rejecting the suggestion that The Hague Convention No. VI operated as a licence which divested the enemy of his alien character and thereby brought him within the recognized exception to the general rule. He went the length of saying that the rule was a barbarous rule running counter to all sense of natural justice, and that it was strange to find it embedded in the practice of any English Court. After pointing out that Great Britain and the United States alone continued to assert its legality, he concluded in these words (1 B. and C. P. C., at p. 105): "The fact is that the rule is a bad rule, much more to be honoured in the breach than in the observance; and if we must acknowledge ourselves to be so far fettered by the dead hand of outworn precedent as to recognize its continued existence, I am, at any rate, determined to permit all such breaches of it as my sense of equity and fair dealing towards the enemy may demand." The actual decision, however, only went to the extent of allowing an enemy to raise any defence founded on The Hague Convention, as had already been done in the English Prize Court, and to extend that indulgence to any enemy who based his claim on the terms of any convention relating to the Suez Canal or on the special relations in which Egypt stood to the British Government.

Subsequently that Court, following its decision in *The Barenfels* ((1915) 1 B. and C. P. C. 122), held that the vessel should be detained and not confiscated, and that, in accordance with article 2 of convention VI, she must be returned or her value paid to the owners at the conclusion of hostilities. On appeal, Sir Samuel Evans being one of the members of the Judicial Committee, the Privy Council substituted an order in the form settled in *The Chile* (*supra*). No reference appears to have been made in the Privy Council to the question of *locus standi*. Inasmuch, however, as the decision turned, in part at any rate, on the application of convention VI, the matter is carried no farther than it was by *The Möwe* (*supra*).

I am fortified in my opinion that the wider claim to an unfettered power of dispensation goes too far by the opinion of Lord Wright in the *Sovfracht* case (*supra*). Referring to the decision of the House of Lords in *Rodriguez* v. *Speyer Brothers* (34 *The Times* L. R. 628; [1919] A. C. 59, at p. 115 *et seq.*) he said: ([1943] A. C., at p. 233): "In any case, the decision is not one to be extended or treated as giving the Court a general liberty to exercise the discretion which appertains to the Crown alone to give or refuse a licence in such cases. The discretion is for the executive and not for the Court."

In *The Roumanian* (31 *The Times* L. R. 111; [1915] P. 26), and on appeal to the Privy Council (32 *The Times* L. R. 98; [1916] A. C. 124), enemy owners of a cargo of oil, shipped on a British ship in Texas for delivery to Hamburg and discharged into tanks in a British port, were heard to argue that the oil so stored was not condemnable in prize. At first sight it would appear that this involved a further extension of the right of audience. From the statement of their contentions set out in the opinion delivered by Lord Parker in the Privy Council (32 *The Times* L. R., at p. 98; [1916] A. C., at p. 131) it would appear that the claimants' case depended in the main on the general law of nations and that the nearest approach to reliance on an international convention was the attempt to draw from the express provisions of the Declaration of Paris, protecting enemy goods other than contraband on neutral ships, an analogous protection, not expressed in the convention itself, in favour of neutral goods in British ships. But when one looks at the argument before Sir Samuel Evans, reported in 1 Ll. Prize Cas. 191, particularly at pp. 193–195, 227, 266 and 267, to which Mr. Nesbitt's researches directed my attention, it appears that the claimants were contending that, by virtue of the fact that the German owners were an international combine, most of whose shares were held by incorporated companies of nations which were not enemies, the claim was untainted by enemy character. Thus the case comes within the general rule. Reliance was also placed on convention No. VI, though this point was abandoned in the Privy Council. The point that the claim was based on exemption from enemy character is made still clearer by the claimants' statement of their reasons in support of the appeal to the Privy Council, set out in 2 Ll. Prize Cas. (at p. 380). Reason No. 1 reads as follows:

> "Because the Europäische Petroleum Union, though a company incorporated at Bremen, is in substance and reality a combination of companies carrying on business in allied or neutral countries, and is not controlled by enemies of the Crown, and the petroleum was not in substance the property of enemies of the Crown."

In the alternative it was asserted that the enemy interest amounted to one-tenth, and that the allied or neutral interests in the remaining nine-tenths of the cargo ought to be exempt from condemnation. On the other side, the Procurator-General in his reasons asserted that the petroleum was the property of an enemy, in that it was owned by a German company having its principal office and place of business in Germany, and that the Court was not called on to inquire into the status or nationality of its individual shareholders, which might vary from day to day, while the enemy character of the German company would continue. It is true that this aspect of the matter does not appear conspicuously in the report of the argument in the Privy Council and is not noticed in the advice tendered to his Majesty by their Lordships, but it may well explain the absence of any comment on the appearance of the claimants before the Court.

In *The Pindos* (32 *The Times* L. R. 489; [1916] 2 A. C. 193), another appeal from the Egyptian Prize Court, the claimants relied on the Suez Canal Convention, 1888. Lord Sumner, delivering the opinion of their Lordships, began by saying: "In view of the fact that reliance was placed on immunities alleged to be claimable under international conventions, no objection has been raised, such as was raised in *The Möwe* (*supra*), to the presence of enemy owners to be heard before their Lordships on appeal," thus reasserting the old rule. Likewise in *The Hakan* (34 *The Times* L. R., at p. 11; [1918] A. C. 148, at p. 150), Lord Parker, after observing that the cargo, being on a neutral ship, was, even if it belonged to enemies, exempt from capture, unless it consisted of contraband goods—see the Declaration of Paris—continued: "The cargo owners did not appear or make any claim in the action, although according to usual practice of the Prize Court even enemies may appear and be heard in defence of their rights under an international agreement." Indeed, the only difficulty arises out of a passage in *The Vesta*, in the Privy Council (37 *The Times* L. R. 505, at p. 508; [1921] 1 A. C. 774, at p. 786), where Lord Sumner said: "Enemy claimants have been repeatedly recognized, to assert rights under international convention, for example, *The Möwe* (*supra*), *The Marie Glaeser* (*supra*); or to contest condemnation of their goods, if shipped or carried under circumstances which give immunity from capture; *The Roumanian* (*supra*), *The Hakan* (*supra*)." It was argued that the latter part of this sentence recognized the existence of a right, unrestricted by any conditions, for an enemy claimant at least to resist condemnation. Actually, as has already appeared, *The Roumanian* (*supra*), apart from a faint reliance on convention VI, is an illustration of the general principle, inasmuch as enemy character was being denied. In *The Hakan* (*supra*) no enemy was before the Court, and the only reference to immunity is in the passage quoted which depends on international agreement. *The Marie Glaeser* (*supra*) was one of the cases in which Sir Samuel Evans reviewed the old decisions. The claim was based on article 3 of convention VI, which had not been ratified by Germany, and Sir Samuel Evans held that there was nothing in the affidavit which tended to show that the hostile character of the owners was suspended in any way, nor was there any suggestion made by those who claimed to appear that there was anything in the nature of a licence to trade, or any circumstance whatever differentiating the alien enemy from any other enemy who might be affected by a judgment of the Prize Court. Thus the decision affirmed the general principle.

If it had really been intended to divide the authorities giving a *locus standi* to an enemy claimant into two groups it would have been more accurate to put *The Marie Glaeser* (*supra*) and *The Roumanian* (*supra*) together as illustrations of the general rule, and *The Möwe* (*supra*) and *The Hakan* (*supra*) as illustrations of the particular instance of reliance on an international convention. But I am satisfied that by the words "circumstances which give immunity from capture" their Lordships never intended to suggest the ex-

istence of a wide range of exemption from the general rule in contrast with the limited area of international convention, and that I was mistaken in *The Pomona* (59 *The Times* L. R. 111 [1943] P. 24) in relying on these words—in accordance, I admit, with my own inclination—as giving me a discretion to hear enemy claimants in that case, seeing that the claim was based on the supposed existence of a principle of international law analogous to articles 1 and 2 of convention VI long after the convention itself had been denounced by this country.

Sir Robert Aske also founded on this passage an argument that there was a distinction between the case of a claimant who asserted rights and one who merely resisted condemnation. Basing himself on the decision of the Court of Appeal in *Porter* v. *Freudenberg* (31 *The Times* L. R. 162; [1915] 1 K. B. 857), which lays down that, as an alien enemy can be sued, it follows that he can appear and be heard in his defence, and may take all such steps as may be deemed necessary for the proper presentment of his defence, he argued that an enemy owner must always have the right at least to resist condemnation of his property if he does not assert any positive right, such as to the release of the goods. He gave as illustrations of what he described as this vital distinction *The Emil* ((1915) 1 B. and C. P. C. 257) and *The Flamenco* (*ibid.* 509). But these were cases of British pledgees who, as such, had no rights as against the captors, but were nevertheless allowed to be heard so as to protect their interests and, if they could, to persuade the Court that as between the captors and the enemy owners the property was not condemnable. In my opinion, they afford no authority whatever for the suggested distinction between a claim by an enemy owner and the mere resistance of condemnation. In the first place, it is established beyond any shadow of doubt that the owner of the goods seized in prize is in the position of a claimant and not of a defendant. The analogy to the case of *Porter* v. *Freudenberg* (*supra*), therefore, falls to the ground. Secondly, the common form of claim set out in the appendix to the Prize Rules contains no claim, in so many words, for release. The claim is "for the said ship," or goods, as the case may be. If it succeeds this claim imports the right to immediate release, unless there is some special right to detain, as under convention VI. The claim in this case follows the usual form, with all the usual incidental claims for loss, costs, charges, damages, and expenses. Even if the suggested distinction existed it would have no application to the present case, but in truth there is no such distinction. In prize the essence of the claim is that the claimant owns the ship or goods, that they are not condemnable and, therefore, that they should be released to him. The special case of what is usually called the *Chile* order is really no exception, as the claimant's right to the property is recognized though its restoration, or the equivalent in compensation, is postponed until the end of hostilities.

Coming now to the *Sovfracht* case (*supra*), this expressly decided that the operation of the rule refusing a *persona standi in judicio* is always subject to

permission being given by Royal licence: see the opinions of Lord Simon, L. C. (59 *The Times* L. R., at p. 103; [1943] A. C., at p. 212), and of Lord Wright ([1943] A. C., at p. 218). And I have no doubt whatever that the same applies to a Court of prize in any case in which prize law refuses a *locus standi*. But I must deal specifically with certain passages which it was suggested create a difficulty in holding that, after this decision, a Prize Court can recognize any exception to the rule refusing a *persona standi in judicio*. The first is in the Lord Chancellor's summary of his own conclusions (59 *The Times* L. R., at p. 102; [1943] A. C., at p. 211):

> "1. The test of enemy character is fundamentally the same whether the question arises over a claim to sue in our Courts, or over issues raised in a Court of Prize, or over a charge of trading with the enemy at common law."

The general truth of this proposition in its application to prize law cannot, of course, be doubted and, inasmuch as what I will call the old rule in prize is based on a suspension of enemy character *pro hac vice*, is not affected by the generality of the above statement. The difficulty is that this general statement of principle ignores the special case arising out of convention VI, where the idea that enemy character was suspended was specifically rejected.

The same difficulty appears even more acutely in the opinion of Lord Wright, who said ([1943] A. C., at p. 219): "The general question of law to be determined is whether enemy character as against one belligerent attaches to a person by reason of the fact that the previously neutral or friendly territory in which he resides or carries on business, that is, has his place of residence or commercial domicil, is subjugated and occupied by the other belligerent. Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English law is not nationality, but domicil in the sense of settled residence or in the case of traders commercial domicil. Domicil in the strict legal sense is not necessarily relevant. Some of these cases were decided in the Prize Court, others in Courts of common law. However, the right to sue or prosecute an action in Court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense. The test is objective and depends on facts, not on the person's prejudices or passions, his patriotism, or his determination to free his country whenever he can."

Again, dealing with the point that military occupation of a place outweighs all considerations founded on the bare legal ownership of the soil, Lord Wright said ([1943] A. C., at p. 227): "This was said, no doubt, in reference to questions of public international law, but the same principle for determining enemy character would apply to questions of municipal law such as whether there is a right to claim a *persona standi in judicio*, whether there is

a liability for the offence of trading with the enemy, and also whether property is subject to arrest or condemnation in a Prize Court."

If these statements of law necessarily lead to the conclusion that domicil in the sense of settled residence or commercial domicil is the sole test, in a Prize Court as in our municipal Courts, of the right to claim to be exempt from seizure and condemnation, to the exclusion of any consideration based on the nature and quality of the claim itself, I should be obliged, respectfully, to decline to be bound by them in prize. That they were not, however, intended to exclude from this right the cases covered by the old rule in prize is, I think, made clear by Lord Wright's adoption of Lord Stowell's judgment in *The Hoop* (*supra*). It is true that in his citations from that judgment Lord Wright does not include the passage dealing with the Prize Court, which I have already quoted. But there is no hint of disapproval of any part of what he describes as the classic statement of the rule, and I am not, therefore, prepared to assume that their Lordships intended to unsettle the established procedure in prize. There is not a single reference in any of their Lordships' opinions to the peculiar case of the claims based on convention VI, as one would have expected if it had been intended to throw any doubt on the validity either of the decisions in the Privy Council recognizing this extension of the old rule or of the rule itself. But the *Sovfracht* case (*supra*), in my opinion, does emphasize the point that this Court should be careful not to extend the exceptions to the general disability of enemy status one whit further than can be justified by authority.

For these reasons I have come to the conclusion that I have no right to extend to an alien enemy any indulgence beyond what was settled during the last war as being the law of nations administered by the Prize Court of this country in this respect. That being so, my decision is that, as regards the claim at present formulated on behalf of the Mitsui Company, the claimant has no *locus standi* and, therefore, he must obtain some authority from the Crown to entitle him to be heard thereon. On the other hand, I hold that the claimant has a *locus standi* to prosecute his claim on behalf of the London branch without any further authority.

There only remains the question of the practice to be followed so as to give effect to these principles. In the first place, the affidavit required to be filed by an alien enemy under order 2, rule 22 and order 3, rule 5, respectively, should show on the face of it the capacity in which the deponent purports to speak on behalf of the claimants. Secondly, the grounds of the claim itself should be set out with sufficient particularity as to disclose, among other things, the basis of the claimant's assertion of a *persona standi in judicio*. Thirdly, the case of a claimant who has already entered an appearance before becoming an alien enemy is not specifically dealt with by the rules; but this is clearly a matter coming within the jurisdiction of the Court to regulate its own procedure under order 45 of the Prize Rules. In such a case I do not think that a fresh appearance need be entered. But after becoming an

alien enemy the claimant should be required to file an affidavit on the same lines as if he were entering an appearance. If the claim itself has already been filed it should be amended, if necessary, to deal with the new situation, and should be verified by the affidavit. In default of a proper and sufficient affidavit, and whether the claimant was originally an enemy or has since become one, it will be open to the Procurator-General to move to strike out the appearance, or the claim, or both, as the case may be. Fourthly, the duty of the Court, when a doubt arises, to assure itself that an enemy claimant can sustain a *persona standi in judicio* and, if so, is regularly represented before the Court, cannot be abrogated. But it is manifestly inconvenient that such matters should be left to the initiative of the Court, or that they should stand over until the hearing itself when all the expense of preparation for trial has been incurred. Accordingly, the Procurator-General, if in any case he is not satisfied that the claimant is in order without some authority from the Crown, should himself bring the matter to the test by an interlocutory application under order 20, as has most properly been done in this case. This may take the form of an application for directions, for a further affidavit, for further and better particulars, or otherwise, as the circumstances of the case may require. It is unnecessary to go further into detail. I would only add that if the Procurator-General has reason to believe that an assertion of *locus standi*, apparently good on the face of the affidavit, is merely colourable, the same procedure will be open to him.

Having regard to the importance of the decision, the Procurator-General has offered to pay the costs of the claimant in any event, and I so direct.

BOOK REVIEWS AND NOTES

Studies in Government and International Law by James Wilford Garner. Edited, with a Biography, by John A. Fairlie. Urbana: the University of Illinois Press, 1943. pp. viii, 574. Plate. $7.50.

This substantial volume contains a biography of the late Professor Garner by his colleague of many years, Professor John A. Fairlie. Garner's life was an uneventful one of scholarship, research, writing, University administration, and public lecturing. Of the latter he did much, not only in all parts of the United States, but also in Europe, India and China. Much attention is given to his activities in the Political Science Department at the University of Illinois, which he organized in 1904 and administered until his death in 1938, building it up from nothing to a department of thirteen faculty members and 2700 students, including 169 graduate students. Tributes from numerous friends and acquaintances are printed after the biography, together with a list of the 17 books and 200 odd articles which he produced. The latter are classified according to the name of the journal in which they appeared, and 28 of them are republished in the present volume, 5 in the French language.

The articles in the volume are grouped into "Studies in Government" and "Studies in International Law." The first group includes studies on southern politics, criminology, French and American government, and public law. The second group contains articles on the law of war, the theory of international law, problems of international adjudication, air law, treaties, and neutrality. This arrangement follows a roughly chronological order because Professor Garner quite definitely shifted his interests to international law during World War I. There is, however, some overlapping.

It is impossible to discuss the content of the republished articles in detail. They illustrate the wide scope of Professor Garner's interests and the careful scholarship with which he dealt with any subject. Many of them are of current interest. For instance, the first study printed, on government in Mississippi during the Civl War, discusses problems of government during a period of blockade and military occupation similar to the present situation of Europe. In spite of his Mississippi origin, Professor Garner treats the peculiar problems of the South with great objectivity. He is, however, in these as in all his articles, practical. He generally urges some reform in government or law in order better to realize principles of democracy and sound government.

The first article in the section on international law (1915) urges broader popular study and understanding in this field as a prerequisite to a more orderly world. Other articles are concerned with the rules of war (in which the German war code is discussed critically), with the punishment of war criminals, and with the problem of sovereignty in international law. The

latter subject, treated in Professor Garner's Presidential address to the American Political Science Association in 1924, is well worth reading at the present time, in view of the current discussions concerning the relation of sovereignty to post-war international organization. He demonstrates by both logic and history the superiority of sovereignty under law to sovereignty in anarchy.

Other international subjects treated are the responsibility of states for injury to aliens, urging observance of international standards; the value of efforts to humanize war; the problems of intervention and non-intervention, especially as illustrated in the Spanish Civil War; the American neutrality policy initiated in 1935; and the legal aspects of German incorporation of Austria.

In these articles Professor Garner takes a position midway between those who, thinking that efforts to humanize war are bound to be futile, urge organization to eliminate war and those who, believing that efforts to prevent war altogether are bound to be futile, urge development of the law of war. He elaborates the principles of collective security which alone give promise of controlling war and urges their acceptance. Realizing, however, the obstacles to success he believes attention should continue to be paid to the law of war. His attitude toward the law of neutrality is more critical. He realizes that a theory which requires non-belligerents to treat the aggressor and his victim alike is incompatible with a system of world order under law in the present interdependent world. For this reason, he tends to be critical of the American neutrality legislation initiated in 1935. He points out, however, that under certain circumstances, such as those which prevailed in the Ethiopian war, the embargoing provisions of this legislation might assist international action against aggression. He duly emphasizes the attitude of President Roosevelt in repudiating the principle of this neutrality legislation in his quarantine speech of 1937.

In view of the Moscow Declaration concerning Austria, Professor Garner's article, written in 1938, on this subject is interesting. He points out that the United States was bound by at least three international treaties not to recognize the forcible incorporation of Austria into Germany. Nevertheless, he thinks American action constituted *de facto* if not *de jure* recognition of the annexation (p. 547).

Many of the articles are of a technical character, but most of them illustrate Professor Garner's political wisdom. He saw the important implications of even technical questions, and he often expressed opinions which, as events turned out, generally proved to be right. The numerous friends of Professor Garner, including the editors and readers of this JOURNAL, with which he was long associated on the Board of Editors, will value this compilation, not only for its intrinsic value but also as a memorial to a great American student of government and international law.

QUINCY WRIGHT

Inter-American Bar Association. Organization of the Association and Proceedings of the First Conference. Washington: published by the Association, 1943. pp. vi, 484. Index.

This volume contains the documents of organization and the record of the First Conference of the Inter-American Bar Association, which was held at Havana, Cuba, March 24–28, 1941. The proceedings have been published in two editions, Spanish and English, although the four languages spoken in the Americas were used at one time or another during the conference. The papers presented at the plenary sessions of the conference are here printed in full, while many of those presented at the meetings of the various round tables have been abridged or summarized. The papers presented to the round tables were principally those of delegates from Cuba and the United States. The exigencies of the war prevented a comparable attendance from delegates from the countries of South America, just as the attendance at the Second Conference held in Rio de Janeiro in August, 1943, prevented a proportionate representation from delegates north of the Rio Grande. However, the reader of the papers in the present volume will be impressed by the universal approach to the problems of law as a whole and with the emphasis laid not upon national particularism but upon law as an indispensable element in all civilized society. As Judge de Bustamante expressed it (p. 96): "Law is the most decisive of social factors because it presupposes the incarnation of justice, without which society would be converted into a torment instead of being a noble and fruitful sphere of activity." The same thought is to be found embodied in the approach of the delegates from the various legal bodies of the United States. It was ably expressed by Attorney General, now Mr. Justice, Jackson when he said (p. 150): "We are haunted by the greatest unfinished task of civilization which is to create a just and peaceful international order. If such a relationship between states is to be realized, we know its foundations will be laid in law, because legal process is the only practical alternative to force."

Each paper is published under the heading of the particular round table to which its subject applies. There were fifteen round tables in all, dealing with subjects such as general comparative law, administrative law and procedure, immigration and nationality laws, communications, problems of double taxation, industrial, economic and social legislation, and penal law and procedure. Space does not permit us to review any of these papers. It will suffice to say that the reader is here furnished with an excellent cross-section of the various legal problems which must be solved in the interests of closer political, commercial, and social ties between the Americas.

ARTHUR K. KUHN

Traité de Droit International Public. By Hildebrando Accioly. Tome I, Paris: Sirey, 1940; pp. xxviii+652. Tome II, 1941; pp. viii+527.

First published at Rio de Janeiro in 1933–1935, in Portuguese, the French translation of this notable work was brought out in Paris just after the

present war began, and contains, in addition to the original text, certain materials appearing after 1935. The author, the well-known Brazilian diplomat and jurist, Ambassador to the Holy See, here treats in classic fashion the usual questions of the law of peace, and also devotes some 70 pages to the League of Nations. He modestly disclaims any intention to produce a *chef d'oeuvre*, his main object being to contribute the fruit of many years of study and experience acquired as a diplomat and public servant. This he accomplishes with great distinction. The peculiar value of the book lies in the number of international law cases cited in which Brazil has had a share, including those which actually involved that great state. In addition we are given the position actually taken by the Brazilian Government on many questions of international law, and numerous opinions emitted by that Government both on actual issues and on doctrinal questions. While the book does not pretend to be based on such an exhaustive consideration of the authorities as distinguish the works of Fauchille or Oppenheim nevertheless it is aptly documented with citations from well-chosen authors. The frequent citations of Latin-American authorities not ordinarily available to the American student are of unusual interest, especially at a time when every factor promoting Pan American understanding is of such importance. Nor are North American and Continental authors in general neglected, although the French school predominates. By its frequent and skillful use of the *Recueil de l'Académie de Droit International de la Haye* the present work affords one more proof of the value of that monumental record, the proceedings of the Academy. In the French and Spanish tradition, Dr. Accioly gives considerable attention to the philosophy of international law, particularly in his introduction.

The spirit in which the book is written is illustrated by the following paragraph from the introduction, in which the author, justifying his decision to bring out a book on the law of nations in the midst of a great war, expresses his faith in the revival of international law once the present world crisis has been passed: "We may reasonably hope that the present crisis will be the precursor of a new start for a science which is not only based on the very instinct of the sociability of mankind but is the necessary condition of the existence of the international community and is bound to march forward in full step with the moral progress of humanity."

JOHN B. WHITTON

Geschichte der Konferenz für die Herabsetzung und die Begrenzung der Rüstungen, 1932–1934. Ein politischer Weltspiegel. By Carl Loosli-Usteri. Zürich: Polygraphischer Verlag, 1940. pp. xxii, 867. Bibliography. Index of persons.

This report on the League Disarmament Conference, its plans, proceedings, and final disappointments, is a mixture of sober chronological account and editorial comment. Throughout two-thirds of its pages the book is naïvely, but strongly, colored by German, and even at some places by Nazi, ideology.

The book was written before the outbreak of World War II. When read under present circumstances it reveals the author's inadequate understanding of modern political and military realities. By the same token, however, it presents an illuminating recapitulation of the illusions characteristic of international efforts of the Geneva species.

In spite of its excessive length, the historical account is very valuable as a collection of facts and arguments advanced at the Conference. Most interesting are the purely technical discussions on industrial and budgetary control of armaments, offensive and defensive weapons, international police forces and the definition of the aggressor, of which the latter may be considered the only lasting achievement of the Conference. Unfortunately, the otherwise interesting account is marred by disregard of military considerations by the author, who devotes his attention chiefly to establishing responsibility for the Conference's failure. It apparently does not occur to him that the Disarmament Conference had served Germany for other than humane purposes, viz., as a most convenient cover for the preparation of a new war. Nor did it occur to the author that the vicissitudes of French foreign policy were due to the inherent military weakness of that country. It is disappointing to labour through more than 800 pages without gaining enlightenment on the basic question of whether security and peace can be achieved through disarmament, or whether disarmament is merely the *post hoc* result of well-established international security.

Even if agreement on the offensive and defensive character of certain weapons should ever be reached and offensive weapons should be abolished, this would not necessarily prevent war. A "defensive" weapon may quickly assume "offensive" value, if the opponent does not possess weapons of superior power. General disarmament simply means that wars will be begun with weapons not included in, or permitted by, the disarmament convention. Such wars will develop slowly and will be won by the country able to produce heavy weapons first, that is to say, by the country with superior industrial resources. The technical discussions in the Conference also show that the attempt to combine disarmament with the principle of military equality is doomed to failure. Furthermore, any such attempt in itself reveals the innate futility of the Disarmament Conference as such. No method has been found to prevent individual countries from deriving military advantages from the disarmament procedure, nor can the countries which suffer a relative loss of power be compensated therefor. One of the Sub-Commissions seriously considered a proposal to set up armies according to a rigid and uniform pattern, so that an infantry regiment or an artillery battery would have the same military value all over the world. Due to inequalities of political purpose, of geographical position, and of human and industrial power, any act of disarmament must advantage one country and harm another. The chief value of disarmament is thus economic, while its military implications may be dangerous to many countries in exposed positions.

Consequently, it is not likely that an agreement on technical grounds alone can ever be achieved. As long as international security is not established, every attempt at general disarmament must fail. For when the potential aggressors are not unilaterally disarmed they will gain additional strength through the disarmament of their future victims. To disarm in order to achieve security is an attempt on the international level to beat the sack and punish the ass.

STEFAN T. POSSONY

A Social Psychology of War and Peace. By Mark A. May. New Haven: Yale University Press, 1943. pp. ix, 284. Index. $2.75.

This work tackles three old and familiar topics: the question of whether war is an inevitable expression of human instincts or not, the problem of social-cultural conditioning to war and peace, and the changes in attitudes, ideas, and habits needed if we are to secure a "permanent" peace.

The opening chapter gives a very sketchy review of certain traditional explanations of the causes of war. The second deals with that perennial query among psychologists as to whether war is due to inherited instincts of pugnacity or to environmental influences. The author takes the position that war is a matter of learning or environment rather than of heredity and on this premise proceeds in the following four chapters in showing how we learn to hate, to fight, to fear, to escape, to love, to defend, and to follow leaders. In this extensive discussion he draws heavily on behavioristic psychology, including the familiar material on the learning of rats. Even where he deals with human conduct there is very little which bears directly on attitudes and habits having to do with war and peace. It is not until the author reaches Chapters 7 and 8 that he treats of these latter, in part, in terms of what he calls "aggressive" and "defensive" social movements. Among other details Professor May repeats a widely accepted idea that the totalitarian revolutions of our time have deliberately as well as unconsciously directed aggression into warlike channels. In contrast, the traditionally more peaceful democracies have done little to prepare the masses for aggressive attacks upon other nations and have rather provided certain sublimated outlets for antagonisms in athletics, in intense business competition, in freedom of speech, and in other similar less violent ways.

Chapter 9 attempts to present the "psychological conditions of peace." Following a familiar argument the author points out that various earlier forms of inter-group conflict within a larger society, such as family feuds and religious and racial strife, have been brought to an end by the evolving *mores* and the law. On the basis of such social experience he wonders why controls of aggression at the international level may not also be established. He is convinced of one thing: world peace must begin with the setting up of international institutions which, in turn, by means of law and education, will, in time, convert the masses to pacific behavior. Mere pleas or propaganda for

peace, unsupported by strong measures of actual control, will, the author thinks, do little to prevent future wars. In discussing some of the particular problems of a sane world order, he recognizes but does little to solve the touchy matter of the voting rights of small as against large and powerful states in any international organization.

The final chapter is directed specifically to the present war—the American part in it and some problems of the future peace. The author traces the drift from neutrality toward more and more active participation in the European conflict. He reviews the controversy between the isolationists and the interventionists, the fluctuations in public anxiety (prior to Pearl Harbor) concerning our role in the war, and the attempt to resolve this anxiety by the device of lend-lease. There is presented but a limited discussion of public reactions since Pearl Harbor.

Professor May concludes the chapter and the book by returning to the discussion regarding the conditions of peace. Like many others he believes that we should plan for peace while the war is actually in progress. Not only should plans be drawn but as far as possible actual steps should be taken to set up a permanent international organization which will carry over into the peace period afterwards. Such steps would give definiteness to our war aims and would serve as sound psychological weapons against our enemies during the rest of the war. Moreover, the very fact that we had set up an international organization during the war itself would have enormous prestige value for continuing the same after the shooting is over. In addition to these suggestions, he accepts the Hoover-Gibson view that before permanent peace conditions be set down for the defeated powers, there should be a long "cooling off" period. He believes that such a scheme would prevent the sewing of the seeds of future wars by the imposition of emotionalized and violent conditions of peace. However, he is also fully aware of the fact that since people are heavily conditioned to punitive ideas which regard the enemy as "criminal," it may be difficult to get mass support for a delay in deciding the final peace terms.

Finally, as a means of fostering international goodwill he looks to the development of some means "to whittle down the diversities and increase the uniformities" among nations and peoples. This is a vast assignment involving the whole matter of cultural inertia with respect to deeply conditioned differences in language, religion, folkways, and nationalist ethos. Certainly few would expect to see global uniformity for long decades to come, even if one accepted this end as desirable in itself. But the author is obviously correct in indicating that until some working basis of relative uniformity on matters of political organization are developed we can not hope for a permanent peace.

But one comment on the basic assumption of this book will be offered. It seems to the reviewer that the author's stress on cultural learning neglects the fact that there are deep roots to human aggression within every individual

which are first established in interpersonal relations prior to the time when cultural effects begin to operate on the individual. That frustrations and consequent aggressiveness can be completely eliminated from behavior seems doubtful. Rather we must find institutional and group ways of sublimating these into less destructive channels than war. Professor May would doubtless agree with this, but his great emphasis on the learning factor may actually mislead some readers into assuming that aggression—as a form of social interaction—can, by adequate conditioning, be completely eliminated. To take this position would, it appears, provide false premise for those who must effectuate the peace to come.

KIMBALL YOUNG

The Army and the Law. By Garrard Glenn, revised and enlarged by A. Arthur Schiller. New York: Columbia University Press, 1943. pp. viii, 187. Table of Cases. Index. $2.75.

This timely revision of Glenn's book presents a condensed but very readable statement of the relation between the common law and the Army. The first edition of *The Army and the Law* was issued at the close of World War I. Professor Schiller has brought it up to date by showing the effect of regulations promulgated and legislation enacted since the last war. The author considers his subject under conditions of peace and war both within the boundaries of this country and overseas. Basic changes in a man's powers, rights, and privileges occur when he is inducted into the Army. This change of status and the effect of substituting the Articles of War and courts-martial for the common law and jury system are discussed. Signal differences that exist between the common law and the body of law by which the Army regulates itself are described with some detail and the boundaries of jurisdiction delineated. The historical origin of the idea of universal service in time of need as against the method of a large standing army is traced by the author and is of interest today in the light of our experience under the Selective Service and Training Act. The history of trading with the enemy legislation and the role the civilian population plays when a country is invaded are outlined and the many common law rights involved indicated. The status of alien enemies who remain in this country after the outbreak of war, such as the Japanese along the Pacific Coast, is analyzed. The right of our military courts to exclusive jurisdiction over our troops stationed in a friendly foreign country is explained. In this volume of handbook size the busy reader, be he lawyer, soldier or patriotic citizen, will find a concise yet full statement of the major changes that occur when the common law finds its jurisdiction ousted or shared by the Army and war and he will have a better understanding of certain problems facing our military commanders both in this country and overseas. The scholarly presentation, complete index, table of cases and full documentation make it a valuable and convenient reference book.

ROBERT M. SPRINGER

Were the Minorities Treaties a Failure? By Jacob Robinson, Oscar Karbach, Max S. Laserson, Nehemiah Robinson, Marc Vichniak. New York: Institute of Jewish Affairs of the American Jewish Congress and the World Jewish Congress, 1943. pp. xvi, 349. Appendixes. Index. $2.00.

The authors of this composite study define their purpose to be "to examine the experiment in minorities protection under the League of Nations" and not "to produce an all-embracing study on the minorities problem." In keeping with their restricted aim they describe very briefly the origin and making of the treaties, provide a succinct analysis of the régime established to supervise their execution, and treat its operation in considerable detail. The argument of the book may be summarized as follows: the protection of minorities was part of the Versailles system. While the League functioned the régime operated, on the whole, quite satisfactorily, if imperfectly. Its shortcomings were due principally to the reluctance of the League organs to adopt, and of the Great Powers to support, adequate measures to insure the observance of minorities' rights. The generally antagonistic attitude of the Minorities States and the fact that some minorities (especially German) "permitted themselves to be used as tools for the disruptive plans of their powerful co-nationals" impeded the efforts of those bodies, like the Permanent Court, which tried to enforce the treaties.

The study is based on a careful examination of the 1) petitions presented to the League, 2) *lettres de clôture* (reports of the Committees of Three), 3) cases considered by the Council, 4) decisions of the Permanent Court, 5) proceedings of the Minorities Congresses, and especially, 6) constitutions, laws, court decisions and administrative decrees of the Minorities States. The value of the book is enhanced by the references in nearly eight hundred footnotes and by appendixes containing such useful information as statistics on minorities in Minorities States and a list of references to the Assembly's discussions on minorities problems.

In the completeness of the data examined and by their studied analysis the authors have made a real contribution to the literature on minorities. A few statements—for example: "the acceptance of these principles [of the treaties] was a prerequisite to their [the Baltic states] admission into the League" (p. 195) and "it is highly probable that the unpublished findings [of the Committees of Three] were largely concerned with clear-cut violations which the committees did not find it opportune to bring to the attention of the Council" (p. 111)—are exceptions to the accuracy and the restraint which characterize their work. The authors make an assumption concerning the purpose of the treaties which the reviewer considers questionable. While they recognize that the immediate objective was to prevent internal discord from disturbing external peace (p. 26 and p. 41) they also appear to regard the treaties as an attempt to establish a permanent guarantee of minorities rights. If the latter assumption is valid it is pertinent to observe that the transfer of Greek and Turkish populations were "in flagrant con-

tradiction to the basic principle of international protection for minorities" (p. 57) and that the minorities needed "positive provisions to ensure the survival of their specific characteristics" (p. 196). The treaties are ambiguous but the reviewer does not think they justify the view that the international guarantee was intended to be permanent.

HOWARD B. CALDERWOOD

The Russian Enigma. By William Henry Chamberlin. New York: Charles Scribner's Sons, 1943. 321 pp. $2.75.

Few and far between are the men who are truly well informed about Soviet Russia. And Mr. Chamberlin may, by all odds, be grouped among those who have contributed most substantially towards an understanding of the Soviet scheme of things.

The immediate reaction to Mr. Chamberlin's book will no doubt correspond with the reader's predilections and predispositions toward Soviet Russia. In fact Maxim M. Litvinov popularized the dictum that only an angel can be objective about Soviet Russia. Moreover most of the facts cited in the book have become more or less universal knowledge. However, Mr. Chamberlin's contribution lies in the fact that he has been able to synthesize in a large measure the various Russian phenomena into a composite interpretation of the U.S.S.R. It is to be regretted that Mr. Chamberlin did not emphasize at greater length the dynamic psychological factors at work which have exercised such a profound influence throughout the twenty-six years of the Soviet régime. Similarly one has to search in vain for an exposition of the Soviet legal structure and the administration of justice within the Soviet Union and for an analysis of the degree to which Soviet jurisprudence reflects Soviet foreign policy.

Likewise it is to be regretted that *The Russian Enigma* has not been prepared with a view to serving as a permanent document to be used as text material in college class rooms. Thus the chapter entitled "Stalin: The Man and the Legend" is probably the least documented chapter in the book. The author resorts to "rumors" and "gossip" (p. 134) and lack of documentation detracts largely from the validity of his exposition of Stalin. Conversely the chapter "From Leninism to Stalinism" reads more convincingly simply because it is fairly well documented. Gifted as Mr. Chamberlin is with an encyclopedic mind, one bemoans the fact that the author did not deem it feasible to substantiate his argumentations by citing original sources, particularly those bearing on the sources of Russia's strength; namely, the revival of nationalism, revolutionary dynamism, gigantic military preparedness, supreme economic development and geographic vastness. In reading *The Russian Enigma* one does not gain a clear impression of either the wide distribution of her own resources or the substantial military and economic aid that Russia has received from the United States and England.

It is also to be regretted that Mr. Chamberlin falls into error when he

attempts to evaluate the Soviet régime in the light of our own experience in the United States and applies our own measuring rods in interpreting the body politic of the Soviet Union during the past twenty-six years. This error is probably due to the fact that he overlooks the motif of the Stalin régime which differentiates it from its predecessor's, the Tsarist, autocracy.

In his concluding chapter Mr. Chamberlin suggests various hypotheses from which he postulates his reasoning concerning Soviet Russia's course of action in the post-war world. Disliking as he does the dictatorial Stalin régime, he doubts very much whether during the transitional period there will be a relaxation of dictatorship. Here again one wishes that the author had documented his suggestions rather than being contented with speculations. For there are sufficiently abundant official Russian sources available in this country to lend credence to and substantiate many of Mr. Chamberlin's arguments and to have added stature to his book as an authentic interpretation.

However, despite some obvious shortcomings indicated above, Mr. Chamberlin has presented an intelligently balanced study of Soviet Russia's scheme of things and has helped to dissipate in a large measure the Russian enigma while making a decided contribution towards an understanding of the Soviet régime that will help in our effort to establish an effective understanding and ultimate coalition between the U.S.S.R. and the U.S.A.

CHARLES PRINCE

A Professor At Large. By Stephen Duggan. New York: The Macmillan Company, 1943. pp. xviii, 168. Index. $3.50.

This timely volume is written by a notable leader in the cause of international understanding. Dr. Duggan has been the Director of the Institute of International Education since its establishment in 1919. Coming now, after long years of efforts to promote mutual appreciation among peoples of the various nations by means of cultural and educational exchanges, Dr. Duggan's book is dedicated "To the men and women of the United Nations whose lives were sacrificed in the cause of freedom during the Second World War."

The reviewer found himself fully engrossed by this book. The author gives interesting accounts of his early experiences in the field of international relations. Well-known men are described as their activities come within the purview of international cultural relations. The background of leading organizations such as the Foreign Policy Council, the Council on Foreign Relations, the World Peace Foundation, and the Williamstown Institute of Politics is presented on the basis of the personal experiences of the author in these efforts. Many prominent figures from various nations pass across the stage as they visit the United States or meet the author in their homeland. The work of the Institute of International Education is traced in a most

readable style as, through the efforts of its Director, it touches the lives of men and women, students, nations, and statesmen, over the years.

Dr. Duggan's book is rich in analytical and interpretative material. On the basis of his wide experience, his travels in various countries, and his life-long devotion to the ideal of the use of education and culture to bring about a better world order, he presents to the reader a gripping account of educational and cultural problems and trends throughout the world. In his story of cultural highlights, however, there is interwoven an appropriate account of political, social, and economic problems in such a way as to give added weight to the conclusions presented. The last three chapters on "Latin America and Our Good Neighbors," "The Quest for Hemispheric Solidarity," and "The United States and the Postwar World" are effective in showing how education and culture are linked with politics and world peace.

There are so many intriguing episodes, observations, and first-hand experiences to be found in this most readable volume that the reviewer can only hope that others will profit by it as he has done. Many lessons of the past and much good advice for the future are recorded in this book by the "professor" who has taken the world as his classroom.

J. EUGENE HARLEY

Documents on International Affairs, 1938. Volume II. Edited by Monica Curtis. London, New York, Toronto: Oxford University Press, 1942. pp. xvi, 365. $7.50.

Volume I of this collection was reviewed in this JOURNAL in October (Vol. 37, p. 702). The present volume contains the documents on the relations of Germany with her neighbors during the year 1938. As this was the year of the Munich crisis these documents are unusually interesting and important. They include "the principle German declarations of policy, the documents relating to the annexation of Austria, those concerning the negotiations between the Government of Czechoslovakia and the Sudeten Germans," as well as those connected with the Munich settlement itself. As one re-reads in these documents the march of events in that year, one realizes anew how impossible it was to try and "do business" with Hitler and the Nazis. At the same time one cannot feel proud of the part played by our "democratic" countries during this period. One is impressed, also, with the magnitude and complexity of the problems which will again confront us in Europe when this war is ended. Some of these documents have not previously been published in English, others are not now readily accessible, and one ("the Fourth Plan"—the Czechoslovak Government's final offer to the Sudeten Germans) which had never been published in its entirety now appears in an English translation at page 178. While Indexes are not as necessary in a book of this kind as in some others their inclusion would have been a convenience and would have added to its usefulness.

NORMAN MACKENZIE

Annual Digest and Reports of Public International Law Cases, 1938–1940. Edited by H. Lauterpacht. London: Butterworth & Co., Ltd., 1942. pp. xxxiv, 607. Tables of cases. Index. 55/– net.

This ninth *Annual Digest* carries the jurisprudence of international law through the year 1940, subject to omissions due to the war, which are to be supplied in a later issue. The large volume contains many cases arising out of the Spanish Civil War, the Italian conquest of Ethiopia, and the activities of the Nazi and Soviet regimes. The longest single section is devoted to jurisdictional immunities of states and their agents; on the other hand, as the Editor sadly points out, the part of his classification covering international organization and administration is entirely unrepresented in the reports. There are presented sixty-one decisions handed down by courts in the United States—almost twice as many as those reported from England proper, the next highest single contributor. France, Italy, Belgium, Switzerland, and the Argentine contribute a substantial number of cases; Germany a few; Japan, China, and the USSR, none. There are six reports from international tribunals: four from the World Court, and two of causes to which the United States was a party.

Outstanding during the period were problems of immunity. English courts, reading accurate if lugubrious Foreign Office statements about *de facto* and *de jure* governments, concluded that two Spanish Governments were entitled to immunity at the same time (Case No. 25). The House of Lords and American courts both upheld requisitions of Spanish ships in their ports by the Spanish Republic, although arriving at their conclusions by somewhat different routes (the *Cristina*, No. 86; the *Navemar* again, No. 68). Courts in the United States struggled with their new liberty to determine whether state-affiliated institutions were entitled to immunity, in cases involving the Roumanian Monopolies Institute (No. 72), the International Committee of Bankers of Mexico (No. 73), and the Polish National Economic Bank (No. 74). The Italian courts assumed jurisdiction, by construction of the Lateran Treaty, over a contract of service with the Archbasilica of the Lateran (No. 41), a theft in the Lateran Museum (No. 172), and succession to the estate of a Cardinal who died in the Palazzo S. Ufficio (No. 173); they upheld Italian execution upon property situated in the palace of St. Appollinaris (No. 42).

The Judicial Committee of the Privy Council affirmed Hong Kong jurisdiction of a murder committed by a British subject employed on a Chinese public ship (*Chung Chi Cheung v. the King* [No. 87]). The German courts construed the Brussels Convention as not conferring immunity on a vessel chartered to a foreign government, exclusively engaged in carrying coal for that government as a naval supply ship (No. 94). They also punished a Jew of German nationality for illegal cohabitation with a German woman in Prague, before the annexation of Czechoslovakia, though the report does not

show whether the defendant was within territory controlled by Germany at any time after the act was committed (No. 97 and note).

Questions of state responsibility treated in the *Panevezys-Saldutiskis Railway Case* (No. 103) and the *Trail Smelter Arbitration* (No. 104) will be familiar to readers of this JOURNAL, as will the question of derivative American nationality in *Perkins v. Elg* (No. 116). *Doyle v. Ries*, decided by the Minnesota Supreme Court, illustrates well how persons may exploit dual nationality (No. 117). The rights of aliens were held by the Mexican Supreme Court not to include land ownership in the maritime zone (No. 132); on the other hand the Argentine Supreme Court refused to apply to an alien an inheritance tax taking eighty-five per cent of the property: "No one would venture to introduce capital into the country if he might be deprived of his property without a judgment founded on law or without previous compensation or if his property could be taxed without law of Congress, in violation of . . . the Constitution" (No. 133). A United States District Judge refused to deport a Czechoslovakian Jew to Czechoslovakia, holding that this would be cruel and unusual punishment (No. 134)! The Brazilian Supreme Court refused to free from detention a Roumanian who, though subject to expulsion, could not obtain a passport from the Roumanian government (No. 144). In an extradition case of some interest a United States Court of Appeals granted extradition against a defense that the statute of limitations had run in the requesting country, France; French law was examined and foreign cases cited (No. 146). A Venezuelan Court was sure that money and goods were not in themselves subject to extradition proceedings (No. 158)!

Diplomatic immunity protected a Belgian Assistant Military Attaché in England from a suit by his wife for possession of a yacht claimed to be hers (No. 162). More important, the Italian Court of Cassation reversed a long-standing rule that diplomatic immunity did not exist with respect to private law acts unconnected with the diplomatic function (No. 164 and note). A United States Circuit Court held that the diplomatic immunity of all conspirators but one did not protect that one from criminal proceedings (No. 168). Certain of the Lateran Treaty cases (Nos. 41, 172, 173) involved questions of immunity of legation premises.

In a very strange case the House of Lords held that the words "High Contracting Parties to the Convention of Warsaw" as used in a contract for carriage, included Belgium, which had signed but not ratified the Convention (No. 178). The Egyptian courts applied to nationals of states not ratifying the Montreux Convention the new *Règlement d'Organisation Judiciaire* called for by the Convention (Nos. 186, 187). There are two discussions by the United States Court of Customs and Patent Appeals of the conditional and unconditional forms of the most-favored-nation clause in United States treaties (Nos. 196, 197).

The English Court of Appeal decided that the charterparty words "if

war breaks out involving Japan" included the hostilities without declaration of war between Japan and China (No. 201). The *Alwaki* (No. 223) shows the English prize court applying the broad terms of the Proclamation on contraband of September, 1939—not, however, without problems and doubts.

This fine issue carries forward the Editor's aspiration to make of the *Digest* a collection of "international law reports proper." It is to be hoped that the tenth issue will be devoted, as he suggests, "to completing the work of the last twenty years by the inclusion of the cases which for various reasons have been omitted from the previous volumes."

Professor Lawrence Preuss deserves a special garland for both careful editing and notes on the United States cases. Professor Lauterpacht and all his collaborators have performed, in the midst of war, a labor of great faith with the highest technical skill. For their indispensable work their profession should again delight to honor them.

LLEWELLYN PFANKUCHEN

NOTES

Can We Win the Peace? By Denna F. Fleming. Nashville: Broadman Press, 1943. pp. 112. $1.00. This little book contains a series of four lectures (the Norton Lectures) given to the faculty and student body of the Southern Baptist Theological Seminary. The author's approach and the wide range of his discussion are suggested by the chapter headings: "Shall We Lose the Peace Again?," "Can We Create a Workable Economic Democracy?," "Ways Out of War," and "Steps Toward Peace." The book, like the original lectures, is intended for an audience which does not have extensive technical knowledge of the problems discussed. It is therefore to be judged as an attempt to present in clear and readable form ideas which the author has come by in the course of years of study, without any attempt to develop in detail the body of factual information and reasoning that lies back of the conclusions expressed. Viewed in that light, it is a useful contribution to the development of enlightened public thought on problems of the peace.

While Professor Fleming makes reasonably clear the path he would take in most instances, it does seem to the reviewer that there is a lack of clarity and definiteness in his discussion of post-war international organization. On page 17, he speaks approvingly of "a strong federation of free nations—not a weak confederation of nations such as the League of Nations was." Again, he says "we must have a world federation strong enough to keep the peace." But, on page 79, he speaks of the need of a true international police force "so safeguarded as to make sure that it remains the servant of the nations, not their master." It would be most helpful if Professor Fleming, on the basis of the considerable thought which he has no doubt given to the subject, would take the opportunity to inform us a little more fully regarding the kind of international organization to keep the peace that he has in mind.

LELAND M. GOODRICH

Inter-American Coffee Board, First Annual Report, 1941–1942. Washington: (published by the Board), 1942. pp. 152. By a convention concluded among fifteen of the American states in 1940 an Inter-American

Coffee Board was created and given substantial powers to regulate the international trade in coffee. The first annual report discloses a great deal of activity by the Board to cope with the extraordinary conditions brought on by war. Quotas to the United States have several times been increased, advance shipments have been authorized, the problem of diverted shipments has been effectively met, and action has been undertaken in coöperation with national authorities for fixing prices. Among the Board's activities mention should be made of the publication of the weekly *Statistical Bulletin*. The report reveals a most promising experiment in international administration, with methods clearly adaptable to the regulation of trade in other commodities. Appended to the report and summarized minutes of the Board are thirty-eight official documents which add much to an understanding of the agency's activities.

NORMAN HILL

The Future Economic Policy of the United States. By William Adams Brown, Jr. Boston: World Peace Foundation, 1943. pp. vi, 101. Suggestions for reading. $.50. This pamphlet, the eighth in the World Peace Foundation's "America Looks Ahead" series, is to be ranked among the most valuable contributions in the avalanche of writings on post-war problems. It is an economic primer in the fundamental sense of the science of economics, namely as a study of choices. In carefully chosen non-technical terms the author presents the problems of future American economic policy by setting up a list of incompatible alternatives which America faces, such as an uncontrolled free enterprise system or a system offering economic security; protection of group (regional or occupational) interests or the fostering of a "dynamic" economy involving constant change at the expense of special group interests; full sovereignty in economic policies or international economic collaboration. The contemporary emphasis on the security aspects of our system is explained largely as a result of the lack of investment opportunities, following closely the trend of thought developed by Prof. Alvin Hansen and his disciples. The author rightly stresses the fact that not the competitive forces in our economic system but the absence or the weakness of competition create maladjustments and insecurity. The main thesis of the book—and, in a sense, an original contribution to the current discussion of post-war problems—is presented in the fifth chapter, where a distinction is drawn between economic security for the individual and economic security for occupational groups. This interesting point needs, it may be suggested, some elaboration, as it represents, in its effect, an almost revolutionary change in political action. In the subsequent discussion of international issues the alternative of internal versus international economic equilibrium and the choice between long-run gains (from a more rational allocation of the world's resources through freer trade) and short-run sacrifices (necessitating painful and "costly" readjustments in the internal economy) are plausibly and clearly elaborated. The author arrives at a rather optimistic conclusion on the basis of a set of what he considers "reasonable" and "most likely" assumptions. The reviewer prefers this positivistic approach to the resigned attitude of some pessimists who thereby deny the usefulness and applicability of their own principles, but the reader might have been more impressed by a sterner note of warning than the author deemed necessary. The only shortcoming of the little book appears in the oversimplified and narrow explanation of the new quest for economic security in Hansonian technological terms

(pp. 22–23). Perhaps it would have been preferable to mention also the change in our general social attitude, an element which appears incidentally five pages later in the discussion of the Beveridge Report ("the social conscience of the day"). According to the preface (by Dr. Leland M. Goodrich) the pamphlet series is primarily intended for the general reader; in the reviewer's opinion, Prof. Brown's book would make excellent collateral reading for college courses in general economics and post-war reconstruction, being definitely of a quality rarely attained by "popular" treatments.

J. HANS ADLER

Modern World Politics. By Thorsten V. Kalijarvi and Associates. New York: Crowell, 1943. pp. xiii, 843. Bibliographies. Maps. Index. $3.75. This volume is intended as a textbook for students. It contains twenty-eight chapters, written by eighteen different authors, a number of them European rather than American in recent origin. It is frankly a product of the present war. Great emphasis is placed upon the element of power and power politics in international relations and on aspects of the international scene not usually given much, if any, attention in scientific treatments of the subject (psychology, the press, military art, geography, espionage, and underground movements). At the same time economic, legal, and administrative aspects of the international problem are not wholly neglected. As is inevitable in such an omnibus treatment there is evident a certain lack of unity or consistency and a tremendous effect of spreading or scattering of attention. There is considerable unevenness in quality among the chapters. There is a certain amount of exaggeration and inaccuracy in the criticisms of the specialized and long-run forms of treatment of the international problems. But if what is wanted is a suggestive survey of many aspects of world politics this is the kind of volume best calculated to fill that demand.

P. B. P.

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* Mention here neither assures nor precludes review later.

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UNITED STATES

REPEAL OF CHINESE EXCLUSION ACTS

Public Law 199, 78th Congress; December 17, 1943

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following Acts or parts of Acts relating to the exclusion or deportation of persons of the Chinese race are hereby repealed: May 6, 1882 (22 Stat. L. 58); July 5, 1884 (23 Stat. L. 115); September 13, 1888 (25 Stat. L. 476); October 1, 1888 (25 Stat. L. 504); May 5, 1892 (27 Stat. L. 25); November 3, 1893 (28 Stat. L. 7); that portion of section 1 of the Act of July 7, 1898 (30 Stat. L. 750, 751), which reads as follows: "There shall be no further immigration of Chinese into the Hawaiian Islands except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands."; section 101 of the Act of April 30, 1900 (31 Stat. L. 141, 161); those portions of section 1 of the Act of June 6, 1900 (31 Stat. L. 588, 611), which read as follows: "And nothing in section four of the Act of August fifth, eighteen hundred and eighty-two (Twenty-second Statutes at Large, page two hundred and twenty-five), shall be construed to prevent the Secretary of the Treasury from hereafter detailing one officer employed in the enforcement of the Chinese Exclusion Acts for duty at the Treasury Department at Washington . . . and hereafter the Commissioner-General of Immigration, in addition to his other duties, shall have charge of the administration of the Chinese exclusion law . . . , under the supervision and direction of the Secretary of the Treasury."; March 3, 1901 (31 Stat. L. 1093); April 29, 1902 (32 Stat. L. 176); April 27, 1904 (33 Stat. L. 428); section 25 of the Act of March 3, 1911 (36 Stat. L. 1087, 1094); that portion of the Act of August 24, 1912 (37 Stat. L. 417, 476), which reads as follows: "*Provided,* That all charges for maintenance or return of Chinese persons applying for admission to the United States shall hereafter be paid or reimbursed to the United States by the person, company, partnership, or corporation, bringing such Chinese to a port of the United States as applicants for admission."; that portion of the Act of June 23, 1913 (38 Stat. L. 4, 65), which reads as follows: "*Provided,* That from and after July first, nineteen hundred and thirteen, all Chinese persons ordered deported under judicial writs shall be delivered by the marshal of the district or his deputy into the custody of any officer designated for that purpose by the Secretary of Commerce and Labor, for conveyance to the frontier or seaboard for deportation in the same manner as aliens deported under the immigration laws."

SEC. 2. With the exception of those coming under subsections (b), (d),

(e), and (f) of section 4, Immigration Act of 1924 (43 Stat. 155; 44 Stat. 812; 45 Stat. 1009; 46 Stat. 854; 47 Stat. 656; 8 U.S.C. 204), all Chinese persons entering the United States annually as immigrants shall be allocated to the quota for the Chinese computed under the provisions of section 11 of the said Act. A preference up to 75 per centum of the quota shall be given to Chinese born and resident in China.

SEC. 3. Section 303 of the Nationality Act of 1940, as amended (54 Stat. 1140; 8 U.S.C. 703), is hereby amended by striking out the word "and" before the word "descendants," changing the colon after the word "Hemisphere" to a comma, and adding the following: "and Chinese persons or persons of Chinese descent:".

CONCURRENT RESOLUTION ON PEACE AIMS PASSED BY HOUSE OF REPRESENTATIVES [1]

September 21, 1943

Resolved by the House of Representatives (the Senate concurring), That the Congress hereby expresses itself as favoring the creation of appropriate international machinery with power adequate to establish and to maintain a just and lasting peace, among the nations of the world, and as favoring participation by the United States therein through its constitutional processes.

SENATE RESOLUTION ON WAR AND PEACE AIMS [2]

November 5, 1943

Resolved, That the war against all our enemies be waged until complete victory is achieved.

That the United States coöperate with its comrades-in-arms in securing a just and honorable peace.

That the United States, acting through its constitutional processes, join with free and sovereign nations in the establishment and maintenance of international authority with power to prevent aggression and to preserve the peace of the world.

That the Senate recognizes the necessity of there being established at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.

That, pursuant to the Constitution of the United States, any treaty made to effect the purposes of this resolution, on behalf of the Government of the United States with any other nation or any association of nations, shall be made only by and with the advice and consent of the Senate of the United States, provided two-thirds of the Senators present concur.

[1] The so-called Fulbright resolution; superseded in the Senate by the Connolly resolution, for which see below. Text from Senate document.

[2] Text by courtesy of the Department of State.

GREAT BRITAIN—SOVIET UNION—UNITED STATES

TRIPARTITE CONFERENCE IN MOSCOW[1]

Anglo-Soviet-American Communiqué

November 1, 1943

The Conference of Foreign Secretaries of the United States of America, Mr. Cordell Hull, of the United Kingdom, Mr. Anthony Eden, and of the Soviet Union, Mr. V. M. Molotov, took place at Moscow from the 19th to 30th of October 1943. There were twelve meetings.

In addition to the Foreign Secretaries the following took part in the Conference:

For the United States of America: Mr. W. Averell Harriman, Ambassador of the United States, Major General John R. Deane, United States Army, Mr. Green H. Hackworth, Mr. James C. Dunn, and experts.

For the United Kingdom: Sir Archibald Clerk Kerr, His Majesty's Ambassador, Mr. William Strang, Lt. General Sir Hastings Ismay, and experts.

For the Soviet Union: Marshal K. E. Voroshilov, Marshal of the Soviet Union, Mr. A. Y. Vyshinski, Mr. M. M. Litvinov, Deputy People's Commissars for Foreign Affairs, Mr. V. A. Sergeyev, Deputy People's Commissar for Foreign Trade, Major-General A. A. Gryslov, of the General Staff, Mr. G. F. Saksin, Senior Official of the People's Commissariat for Foreign Affairs, and experts.

The agenda included all the questions submitted for discussion by the three Governments. Some of the questions called for final decisions and these were taken. On other questions, after discussion, decisions of principle were taken: these questions were referred for detailed consideration to commissions specially set up for the purpose, or reserved for treatment through diplomatic channels. Other questions again were disposed of by an exchange of views.

The Governments of the United States, the United Kingdom and the Soviet Union have been in close coöperation in all matters concerning the common war effort. But this is the first time that the Foreign Secretaries of the three Governments have been able to meet together in conference.

In the first place there were frank and exhaustive discussions of measures to be taken to shorten the war against Germany and her satellites in Europe. Advantage was taken of the presence of military advisers, representing the respective Chiefs of Staff, in order to discuss definite military operations, with regard to which decisions had been taken and which are already being prepared, and in order to create a basis for the closest military coöperation in the future between the three countries.

Second only to the importance of hastening the end of the war was the

[1] Text from the Department of State Bulletin.

unanimous recognition by the three Governments that it was essential in their own national interests and in the interest of all peace-loving nations to continue the present close collaboration and coöperation in the conduct of the war into the period following the end of hostilities, and that only in this way could peace be maintained and the political, economic and social welfare of their peoples fully promoted.

This conviction is expressed in a declaration in which the Chinese Government joined during the Conference and which was signed by the three Foreign Secretaries and the Chinese Ambassador at Moscow on behalf of their governments. This declaration, published today, provides for even closer collaboration in the prosecution of the war and in all matters pertaining to the surrender and disarmament of the enemies with which the four countries are respectively at war. It sets forth the principles upon which the four governments agree that a broad system of international coöperation and security should be based. Provision is made for the inclusion of all other peace-loving nations, great and small, in this system.

The Conference agreed to set up machinery for ensuring the closest cooperation between the three Governments in the examination of European questions arising as the war develops. For this purpose the Conference decided to establish in London a European Advisory Commission to study these questions and to make joint recommendations to the three Governments.

Provision was made for continuing, when necessary, tripartite consultations of representatives of the three Governments in the respective capitals through the existing diplomatic channels.

The Conference also agreed to establish an Advisory Council for matters relating to Italy, to be composed in the first instance of representatives of their three governments and of the French Committee of National Liberation. Provision is made for the addition to this council of representatives of Greece and Yugoslavia in view of their special interests arising out of the aggressions of Fascist Italy upon their territory during the present war. This Council will deal with day-to-day questions, other than military operations, and will make recommendations designed to coördinate Allied policy with regard to Italy.

The three Foreign Secretaries considered it appropriate to reaffirm, by a declaration published today, the attitude of their Governments in favor of restoration of democracy in Italy.

The three Foreign Secretaries declared it to be the purpose of their Governments to restore the independence of Austria. At the same time they reminded Austria that in the final settlement account will be taken of efforts that Austria may make towards its own liberation. The declaration on Austria is published today.

The Foreign Secretaries issued at the Conference a declaration by President Roosevelt, Prime Minister Churchill and Premier Stalin containing a

solemn warning that at the time of granting any armistice to any German Government those German officers and men and members of the Nazi party who have had any connection with atrocities and executions in countries overrun by German forces will be taken back to the countries in which their abominable crimes were committed to be charged and punished according to the laws of those countries.

In the atmosphere of mutual confidence and understanding which characterized all the work of the Conference, consideration was also given to other important questions. These included not only questions of a current nature, but also questions concerning the treatment of Hitlerite Germany and its satellites, economic coöperation and the assurance of general peace.

Declaration of Four Nations on General Security

The Governments of the United States of America, the United Kingdom, the Soviet Union and China:

United in their determination, in accordance with the Declaration by the United Nations of January 1, 1942, and subsequent declarations, to continue hostilities against those Axis powers with which they respectively are at war until such powers have laid down their arms on the basis of unconditional surrender;

Conscious of their responsibility to secure the liberation of themselves and the peoples allied with them from the menace of aggression;

Recognizing the necessity of ensuring a rapid and orderly transition from war to peace and of establishing and maintaining international peace and security with the least diversion of the world's human and economic resources for armaments;

Jointly declare:

1. That their united action, pledged for the prosecution of the war against their respective enemies, will be continued for the organization and maintenance of peace and security.

2. That those of them at war with a common enemy will act together in all matters relating to the surrender and disarmament of that enemy.

3. That they will take all measures deemed by them to be necessary to provide against any violation of the terms imposed upon the enemy.

4. That they recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.

5. That for the purpose of maintaining international peace and security pending the reëstablishment of law and order and the inauguration of a system of general security, they will consult with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations.

6. That after the termination of hostilities they will not employ their military forces within the territories of other states except for the purposes envisaged in this declaration and after joint consultation.

7. That they will confer and coöperate with one another and with other members of the United Nations to bring about a practicable general agreement with respect to the regulation of armaments in the post-war period.

V. MOLOTOV
ANTHONY EDEN
CORDELL HULL
FOO PING-SHEUNG

Moscow, 30th October, 1943.

Declaration Regarding Italy

The Foreign Secretaries of the United States of America, the United Kingdom and the Soviet Union have established that their three Governments are in complete agreement that Allied policy towards Italy must be based upon the fundamental principle that Fascism and all its evil influences and emanations shall be utterly destroyed and that the Italian people shall be given every opportunity to establish governmental and other institutions based upon democratic principles.

The Foreign Secretaries of the United States of America and the United Kingdom declare that the action of their Governments from the inception of the invasion of Italian territory, in so far as paramount military requirements have permitted, has been based upon this policy.

In the furtherance of this policy in the future the Foreign Secretaries of the three Governments are agreed that the following measures are important and should be put into effect:

1. It is essential that the Italian Government should be made more democratic by the introduction of representatives of those sections of the Italian people who have always opposed Fascism.

2. Freedom of speech, of religious worship, of political belief, of the press and of public meeting shall be restored in full measure to the Italian people, who shall also be entitled to form anti-Fascist political groups.

3. All institutions and organizations created by the Fascist regime shall be suppressed.

4. All Fascist or pro-Fascist elements shall be removed from the administration and from the institutions and organizations of a public character.

5. All political prisoners of the Fascist regime shall be released and accorded a full amnesty.

6. Democratic organs of local government shall be created.

7. Fascist chiefs and other persons known or suspected to be war criminals shall be arrested and handed over to justice.

In making this declaration the three Foreign Secretaries recognize that so

long as active military operations continue in Italy the time at which it is possible to give full effect to the principles set out above will be determined by the Commander-in-Chief on the basis of instructions received through the Combined Chiefs of Staff. The three Governments parties to this declaration will at the request of any one of them consult on this matter.

It is further understood that nothing in this resolution is to operate against the right of the Italian people ultimately to choose their own form of government.

Declaration on Austria

The Governments of the United Kingdom, the Soviet Union and the United States of America are agreed that Austria, the first free country to fall a victim to Hitlerite aggression, shall be liberated from German domination.

They regard the annexation imposed upon Austria by Germany on March 15, 1938, as null and void. They consider themselves as in no way bound by any changes effected in Austria since that date. They declare that they wish to see reëstablished a free and independent Austria, and thereby to open the way for the Austrian people themselves, as well as those neighboring states which will be faced with similar problems, to find that political and economic security which is the only basis for lasting peace.

Austria is reminded, however, that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany, and that in the final settlement account will inevitably be taken of her own contribution to her liberation.

Declaration of German Atrocities

The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled. The brutalities of Hitlerite domination are no new thing and all the peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are now being redeemed by the advancing armies of the liberating Powers and that in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites, and on French and Italian territory.

Accordingly, the aforesaid three allied Powers, speaking in the interests of the thirty-two (*thirty-three*) United Nations, hereby solemnly declare and give full warning of their declaration as follows:

At the time of the granting of any armistice to any government which may

be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. Lists will be compiled in all possible detail from all these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxemburg, France and Italy.

Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.

(Signed): ROOSEVELT
CHURCHILL
STALIN

CONFERENCE OF PRESIDENT ROOSEVELT, GENERALISSIMO CHIANG KAI-SHEK, AND PRIME MINISTER CHURCHILL IN NORTH AFRICA[1]

President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill, together with their respective military and diplomatic advisers, have completed a conference in North Africa.

The following general statement was issued:

"The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.

"The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since

[1] White House press release; Department of State Bulletin, Vol. IX, No. 232 (December 4, 1943), p. 393.

the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent.

"With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan."

CONFERENCE OF PRESIDENT ROOSEVELT, PRIME MINISTER CHURCHILL AND PREMIER STALIN AT TEHRAN

Declaration of the Three Powers, December 1, 1943 [1]

We—The President of the United States, the Prime Minister of Great Britain, and the Premier of the Soviet Union, have met these four days past, in this, the Capital of our Ally, Iran, and have shaped and confirmed our common policy.

We express our determination that our nations shall work together in war and in the peace that will follow.

As to war—our military staffs have joined in our round table discussions, and we have concerted our plans for the destruction of the German forces. We have reached complete agreement as to the scope and timing of the operations to be undertaken from the east, west and south.

The common understanding which we have here reached guarantees that victory will be ours.

And as to peace—we are sure that our concord will win an enduring Peace. We recognize fully the supreme responsibility resting upon us and all the United Nations to make a peace which will command the goodwill of the overwhelming mass of the peoples of the world and banish the scourge and terror of war for many generations.

With our Diplomatic advisors we have surveyed the problems of the future. We shall seek the coöperation and active participation of all nations, large and small, whose peoples in heart and mind are dedicated, as are our own peoples, to the elimination of tyranny and slavery, oppression and intolerance. We will welcome them, as they may choose to come, into a world family of Democratic Nations.

No power on earth can prevent our destroying the German armies by land, their U Boats by sea, and their war plants from the air.

[1] White House press release; Department of State Bulletin, Vol. IX, No. 233 (December 11, 1943), p. 409. Spelling, etc., as given in the original.

Our attack will be relentless and increasing.

Emerging from these cordial conferences we look with confidence to the day when all peoples of the world may live free lives, untouched by tyranny, and according to their varying desires and their own consciences.

We came here with hope and determination. We leave here, friends in fact, in spirit and in purpose.

ROOSEVELT, CHURCHILL AND STALIN

Signed at Tehran, December 1, 1943

Declaration Regarding Iran [1]

The following communiqué, dated December first, was issued in Tehran December 6 after the three-power meeting:

The President of the United States of America, the Premier of the Union of Soviet Socialist Republics, and the Prime Minister of the United Kingdom, having consulted with each other and with the Prime Minister of Iran, desire to declare the mutual agreement of their three Governments regarding their relations with Iran.

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom recognize the assistance which Iran has given in the prosecution of the war against the common enemy, particularly by facilitating transportation of supplies from overseas to the Soviet Union. The three Governments realize that the war has caused special economic difficulties for Iran and they are agreed that they will continue to make available to the Government of Iran such economic assistance as may be possible, having regard to the heavy demands made upon them by their world-wide military operations and to the world-wide shortage of transport, raw materials and supplies for civilian consumption.

With respect to the post-war period, the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom are in accord with the Government of Iran that any economic problem confronting Iran at the close of hostilities should receive full consideration along with those of the other members of the United Nations by conferences or international agencies held or created to deal with international economic matters.

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom are at one with the Government of Iran in their desire for the maintenance of the independence, sovereignty and territorial integrity of Iran. They count upon the participation of Iran together with all other peace-loving nations in the establishment of international peace, security and prosperity after the war in accordance with the principles of the Atlantic Charter, to which all four governments have continued to subscribe.

[1] Text as cabled from Tehran; *ibid.*

UNION OF AMERICAN REPUBLICS

PRELIMINARY RECOMMENDATION ON POST-WAR PROBLEMS OF THE INTER-AMERICAN JURIDICAL COMMITTEE[1]

Report of the Executive Committee of the Governing Board of the Pan American Union on Post-War Planning
November 2, 1942

The resolution on Post-War Problems adopted at the Third Meeting of Ministers of Foreign Affairs of the American Republics[2] entrusted to the Inter-American Juridical Committee the formulation of recommendations relative to international organization in the juridical and political fields and in the field of international security in the post-war period.

The same resolution requested the Inter-American Financial and Economic Advisory Committee to perform a similar function in the economic field and also to undertake preliminary studies for an Inter-American Technical Economic Conference to study present and post-war problems.

At the same time the Pan American Union was requested to appoint an Executive Committee to transmit to the governments such projects as might be received from the Inter-American Juridical Committee and the Inter-American Financial and Economic Advisory Committee and to forward to these entities such projects as the American nations may present. The undersigned have been named to constitute the Executive Committee referred to in this portion of the resolution.

The Executive Committee has received from the Inter-American Juridical Committee preliminary recommendations on post-war problems with a series of conclusions embodying general principles upon which, in the opinion of the Committee, law and order should be based in the future to the end that a just and permanent peace may be established among nations. The text of these recommendations is attached hereto. With respect to this preliminary report, the undersigned beg to submit the following recommendations:

1. That the preliminary recommendations on Post-war Problems formulated by the Inter-American Juridical Committee be transmitted to the Governments for consideration.
2. That the Governments be requested to send to the Pan American Union as soon as possible such observations and comments as they may have to make thereon, for transmission to the Committee.
3. That the Governments be requested to forward such other projects as they may wish to present on international organization in the juridical and political fields and in the field of international security, as well as in the economic field, in order that they may be transmitted respectively to the Inter-American Juridical Committee and to the Inter-American Financial and Economic Advisory Committee.

[1] Text as issued by the Pan American Union.
[2] This JOURNAL, Vol. 36 (1942), Supplement, p. 85.

It is understood that the Inter-American Juridical Committee is planning to follow up the preliminary recommendations with more detailed studies of the different problems involved. With reference to these detailed studies the undersigned feel that it would be highly desirable if preferential consideration were given to those matters that relate more specifically to the Republics of the American Continent, and especially to their position in and relationship to any international organization that may be created following the conclusion of the war.

No actual steps have yet been taken looking toward the convocation of the Inter-American Technical Economic Conference contemplated by the resolution of Rio de Janeiro. As a preliminary to such a meeting, the Inter-American Financial and Economic Advisory Committee has been requested to undertake the study and formulation of recommendations on the post-war economic organization. As soon as these studies have been made and recommendations received from the Financial and Economic Advisory Committee, the undersigned will submit a further report with reference to the steps that should be taken to convene the contemplated Inter-American Technical Economic Conference.

Respectfully submitted

(S) F. CASTILLO NÁJERA
Ambassador of Mexico
(S) C. E. ALFARO
Ambassador of Ecuador
(S) CARLOS MARTINS
Ambassador of Brazil
(S) AURELIO F. CONCHESO
Ambassador of Cuba
(S) J. C. BLANCO
Ambassador of Uruguay
(S) ADRIÁN RECINOS
Minister of Guatemala
(S) A. VARGAS
Chargé d'Affaires of Colombia

November 2, 1942.

Preliminary Recommendation on Post-War Problems of the Inter-American Juridical Committee

September 5, 1942

Introduction

The Third Meeting of Foreign Ministers of the American Republics, held at Rio de Janeiro in January of this year, entrusted to the Inter-American Juridical Committee, which it created, the task of formulating specific recommendations with respect to international organization in the juridical and political fields and in the field of international security.

In consequence of limitations imposed by time and circumstances, the Committee believes it wiser to defer for the moment the formulation of the specific recommendations referred to. Instead, it has chosen to begin its

work with the Preliminary Recommendation here offered, which sets forth certain ideas of a fundamental character bearing upon the establishment of international peace and the maintenance of law and order.

These ideas are necessarily based upon the experience of the past. In consequence, the first part of the document, dealing with the background of the present conflict, calls attention to the gradual deterioration of international law from its earlier character of a rule of moral conduct—a deterioration observable before the first world war and later culminating in the false ideologies created by the Axis Powers with the deliberate object of satisfying their desire to expand their territories at the expense of the rights of weaker states; it then examines the political, economic and social conditions which may be considered as factors leading to the world war of 1914, that ended only in appearance in 1918; it examines further the causes of the present war, many of which are the same as those that brought on the earlier war; and it analyzes briefly the reasons for the failure of the League of Nations to accomplish the objectives proclaimed in the Covenant.

The second part of the Preliminary Recommendation, drafted in the form of conclusions to be drawn from the first part, sets forth the fundamental principles which, it is believed, must guide the policy of states in the restoration of law and order after the war.

In carrying out its task the Committee gave consideration to the standards of conduct laid down in the "Reaffirmation of the Fundamental Principles of International Law," which it drafted in response to Resolution XXVIII of the Third Consultative Meeting, and which was offered to the American Governments on June 2 of this year, for signature in the Pan American Union. For the Committee believes that the fundamental principles adopted by the American Republics can be made the basis of a just and permanent peace. At the same time the Committee took into account Resolution XXXV of the Consultative Meeting, in which the Foreign Ministers took note of the contents of the Atlantic Charter and expressed to President Roosevelt their satisfaction with the inclusion in that document of principles which constitute part of the juridical heritage of America, thus indicating the general standards by which the States of the Western hemisphere should be guided in their search for a solution of post-war problems.

The Committee did not overlook the fact that if the supreme objective of a permanent and just peace is to be attained by the coöperation of all nations it will be necessary for each one of them to accept a responsibility proportionate to its ability to contribute to that end; and that plans of a progressive character will have to be adopted, giving first consideration to emergency measures, such as the complex problems of the period of transition between the end of hostilities and a definitive treaty of peace, and leaving sufficient latitude for the later adoption, as conditions warrant, of more permanent measures, such as the determination of the machinery of government which it will be necessary for the community of nations to adopt in

order to bring about a peace based upon the principle of collective security and guaranteed by pledges of coöperative defense.

It may be observed, further, that in its analysis of the causes of the war the Committee followed, for the sake of clarity, a logical classification of its material. It was aware, however, that many of the factors separately analyzed as political, economic and social, in reality worked together in bringing about the breakdown of law and order. This same interdependence of the various causes of the war, and the desire to present a sufficiently rounded report, led the Committee to undertake a general examination of the economic factors, the specific study of which falls to the Inter-American Financial and Economic Advisory Committee.

The Committee intends to study and to formulate at a later date specific recommendations representing the detailed application of the principles set forth in the second part of this Preliminary Recommendation. In doing so it will take into account the suggestions and projects which the American Governments may present to it in accordance with the terms of Resolution XXV.

In the meantime the present Recommendation is submitted to the Governments of the American Republics in the hope that it will contribute to the creation of some measure of uniformity in their points of view with relation to international organization in the post-war period. For the Committee is of the opinion that it is of the greatest importance that the American Governments should forthwith determine upon a general line of conduct, so that they may be able when the time comes to take a united stand in meeting the problems presented and in assuming the responsibilities involved in their solution.

FACTORS WHICH CONTRIBUTED TO THE BREAKDOWN OF INTERNATIONAL LAW AND ORDER

I. Limitations of International Law Before 1920

a. Theory of international "positive" law. In the years preceding the war of 1914 the general theory of international law was based upon false premises. The early writers on international law, the Spanish theologians, Grotius and other authors, appear to have had a clear conception of the moral basis of international law, however far removed from moral standards the actual conduct of nations in those times may have been. They recognized the existence of a law of nature, representing the dictate of right reason and applicable to the relations of states. Later writers, such as Vattel in the eighteenth century, showed a tendency to adjust moral principles to the actual conduct of nations and to establish the theory that each nation was the judge of its own moral conduct. By the end of the nineteenth century there was a tendency on the part of many writers to adopt what was called a "positive" attitude towards international law. These writers abandoned

almost entirely the task of formulating moral standards by which the conduct of nations might be judged, and instead they adopted the pragmatic standard that the actual practice of nations, as expressed in usages and customs, constituted the only valid international law. The result was that the exponents of this mistaken theory came to determine the existence of rules of international law by the record of the conduct of nations, instead of judging the conduct of nations by the principles of law.

After the first world war the necessity was seen of a new theory of international law, and the effort was made to assign to the new law the function not only of enforcing existing rules of conduct but of bringing the law itself into harmony with a higher standard of international justice and a better organized community of nations. Nevertheless the tendency still continued of asserting the priority of the will of the individual state over the fundamental principles of the moral law.

b. The use of force considered legitimate as a means of pursuing claims or obtaining legal redress. This mistaken conception of international law led to the admission of the principle that when controversies arose between two states and methods of direct negotiation failed, either of the parties might take the law into its own hands and resort to force as a means of obtaining satisfaction for its alleged rights. The claimant state, having decided for itself that its vital national interests were at stake, was permitted to "defend" them by whatever means it might have at its disposal. War was thus a legalized procedure, the *ultima ratio* of organized states, as it had been the *ultima ratio* of kings and princes in earlier centuries.

Once entered upon, war gave rise to a distinct set of rights and duties called the "laws of war," which purported to regulate the conduct of belligerents. These laws of war were characterized chiefly by their violation, due to the fact that new instruments of war and new conditions led the belligerents to consider the existing rule inapplicable.

c. Limited scope of methods for the peaceful settlement of international disputes. During the last decades of the nineteenth and the first decade of the twentieth century numerous treaties were entered into providing for the arbitration of international disputes. But in consequence of the claim made by states that their sovereign wills should take priority over the fundamental principles of international law, these arbitration treaties were limited in scope and contained, with few exceptions, a proviso in accordance with which the obligation to arbitrate excluded disputes which involved the national honor and the vital interests of the contracting parties. By the unrestricted use of this proviso, the two states were left at liberty to arbitrate only the disputes which they were willing to arbitrate, with the result that the disputes which were excluded were the very ones which it was necessary to arbitrate if recourse to war was to be avoided. On the other hand many of these treaties, called "voluntary arbitration treaties," contained the further defect of requiring, as a condition of entering into effect, a new

agreement in which the arbitrators were to be designated and the procedure determined; all of which made a successful outcome the more doubtful.

After the creation of the League of Nations a considerable increase in the number of arbitration treaties was to be observed. But except in particular instances, particularly in America, the scope of these treaties and their practical application continued to be limited, and states resorted to arbitration only for the settlement of questions of secondary interest. Thus the Hague Permanent Court of Arbitration took jurisdiction over a number of cases, but all of them were of relative unimportance. Even the Permanent Court of International Justice, in spite of its remarkably successful record, was unable, by reason of its limited jurisdiction, to meet the real needs of the time.

d. The principle of neutrality. Consistently with its acceptance of the legality of war, traditional international law recognized the right of third states, not being parties to a particular controversy, to remain aloof from the conflict. The community of nations was not organized so as to guarantee the independence and territorial integrity of its members. No responsibility was recognized to come to the rescue of the victim of an unjust attack, or to distinguish between belligerents on the basis of their observance or their disregard of international standards of conduct. Rather the neutral state frequently saw in the war opportunities of profit for itself, which to a greater or less extent might counterbalance the losses caused by the rules of contraband and blockade.

The extravagant demands of the belligerents in the exercise of their rights and their flagrant violation of their duties to neutral states, as well as the conflict between the effort of the belligerents to extend indefinitely the rules of contraband and blockade and the resistance of neutral states to interferences with their commerce with the belligerents, led certain neutral states to enter the war of 1914. But in these cases the neutral state acted primarily in defense of its own national interests and not in defense of the principle of international law and order.

After the first World War the Covenant of the League of Nations created an international organization based upon a system of collective security, which established the principle of common responsibility for the maintenance of international peace and which contemplated the application of various forms of sanctions against states which might violate the principles of the Covenant. But the old conception of neutrality continued, in spite of its being inconsistent with the new principles. This was due in part to the policy of isolation followed by certain powers, whose peoples and governments were more intent upon their own immediate national security than upon the attitude incumbent upon them as members of the community of nations. This policy, in spite of its justifiable domestic objectives, was an indirect encouragement to the aggressors. In addition to this effect, the neutrality policy of these states served as an excuse for certain members of

the League of Nations not to apply the sanctions of the Covenant against an aggressor, on the ground that the sanctions would be defeated in part by the continuance of trade between these neutral states and the aggressors.

e. Unrestricted sovereignty. The conception of the unrestricted sovereignty of states had been one of the chief obstacles to the attainment of effective international coöperation. Corresponding to unrestricted sovereignty in the relations of states would be unrestricted liberty in the relations of citizens within the state. The same anarchy and disorder might be expected in both cases.

While in the years preceding the war of 1914 certain restrictions upon their sovereignty were recognized by nations, in practice they disregarded them. They were the judges in their own case and they appealed to the arbitrament of force to obtain what they claimed to be their rights. The idea of interdependence had practically no influence upon their conduct.

After the first world war the principles laid down in the Covenant of the League of Nations, particularly the principle of collective responsibility for the maintenance of international peace and the new rule that the refusal of a state to arbitrate a controversy and its resort to war should constitute an offense against all the members of the League, restricted the absolute sovereignty of states in favor of the general welfare. Nevertheless the conception of unlimited sovereignty still prevailed, reducing the effectiveness of the League of Nations and constituting in itself a ground of potential conflict between states and leading easily to the violation of the rights of others.

II. Defects of International Organization

a. Absence of an effective international organization before 1920. On the eve of the World War in 1914 the body of customs and of treaty provisions which was called "International Law" was far from corresponding to the conception of "law" recognized within the individual state. The elaborate rules which constituted the law dealt only with rights and duties of lesser consequence. The vital political and economic interests of states were outside the law.

War was a legal procedure; and the efforts of international conferences, such as those held at the Hague in 1899 and 1907, were directed towards regulating its effects rather than prohibiting recourse to it. The community of nations was so loosely organized that when critical situations arose the Governments concerned in the particular controversy could only negotiate at a distance and in an atmosphere of hostility, while the rest of the community watched the development of the crisis with indifference or with a sense that they were helpless to prevent the coming catastrophe. There was not even the machinery of common consultation, which might have permitted the foreign offices to conduct negotiations more effectively than was possible by the ordinary channels of diplomacy.

b. The League of Nations. The lesson of the World War was not lost upon a number of the leading statesmen of the Allied Powers. President Wilson, after proclaiming his "Fourteen Points" of a just peace, sought to create a worldwide organization which would have as its primary function "to promote international coöperation and to achieve international peace and security." International law entered upon a new stage in which the entire body of states, organized in the League of Nations, was to assume responsibility for the maintenance of peace.

But the United States, notwithstanding the fact that President Wilson had been chiefly responsible for the establishment of the League, refused to coöperate with it, with the result that from the beginning the League lacked the support of one of the members of the community whose coöperation was most necessary to its effective operation. Other important states did not coöperate continuously, either because they became members after its establishment or because they resigned after having been members for a longer or shorter time.

The defects in the organization of the League of Nations might perhaps have been overcome if its actual members had upheld its principles more effectively. But instead the policies of the Great Powers influenced the decisions at Geneva and in some cases prevailed over the spirit of the Covenant. The Locarno agreements, for example, instead of gravitating to the League and adding to its authority were, in a sense, inspired by contrary sentiments,—they made the League come to Locarno.

On the other hand the same Great Powers conceived the purpose of the League more in terms of maintaining the *status quo* than in terms of promoting the welfare of the international community. Article 19 of the Covenant had in mind the possibility of bringing about peaceful changes in the *status quo*. But the necessity of unanimous consent defeated the application of this article and made it impossible to carry out that greatly needed function.

In consequence of its limited functions the development of the League of Nations into an effective organization for the maintenance of peace proceeded slowly and then completely halted. Peace was regarded as a static condition rather than as a dynamic process. It was thought of in negative terms as the absence of war, rather than in positive terms as a continuing process of protecting human rights and meeting human needs.

c. The breakdown of the system of collective security. Law and order demand first of all the repudiation of violence, an absolute ban upon recourse to war as a means of enforcing claims and as an instrument of national policy. But law and order also demand that the whole community of nations shall assume a collective responsibility both to prevent aggression and to give aid to the victim of an attack, and at the same time the creation of an effective machinery for the settlement of international disputes. States came to consider their national security as endangered rather by

threats of direct attack than by a general breakdown of law and order. Thus it was possible that, notwithstanding voices that spoke out clearly on behalf of justice and the rule of law, the leading members of the League acquiesced in the violation of the integrity of China by Japan in 1931, when Manchuria was invaded; and again it was possible for them to take but inadequate measures to restrain Italy from invading Ethiopia in 1935. The open defiance of law and order by Japan and by Italy and the temporary success of their resort to methods of violence brought the whole system of collective security into disrepute; so that the annexation of Austria met with no resistance from the League, and the dismemberment of Czechoslovakia in the same year was carried out without reference to the League as an organized body. When in March, 1939, Germany openly repudiated the Munich agreement of "appeasement," it was too late to restrain the aggressor. Confidence in collective action had been so far destroyed as to make a united front for the defense of law and order impossible. Each nation found itself obliged to shift for itself and to meet the threat of war by looking to its own security. War came, as was to be expected; and after it had broken out the invasion of the Baltic States by Russia was a logical consequence of the success which had attended the initial aggression.

III. Political Factors

a. The system of a balance of power. In the years preceding the establishment of the League of Nations the complete absence of any conception of collective security led to the adoption of the system of the so-called "balance of power," which had as its objective that no state or group of states should acquire a dominant position in the international community. Alliances were formed to counteract the power of a particular state; and these alliances were in turn met by counter-alliances. But this balance of power was an inherently unstable balance, with its scales constantly shifting.

Under these conditions the relations of states were characterized by antagonism, distrust and fear of attack. The balance of power bore no relation to justice; and in being raised to the level of a political principle it necessarily implied that international relations were based upon force and that states were by their nature divided into hostile groups.

Peace of any permanent character was scarcely to be hoped for under these circumstances. If the balance of power succeeded in preventing small wars, it did so at the expense of keeping the world in the condition of an armed camp. There was complete lack of mutual confidence between the leading powers; and eventual war upon a larger and more devastating scale was inevitable.

In this sense it may be said that the war which broke out in 1914 was not so much the result of the deliberate act of a particular state as it was the result of a defective international system, which contained in itself the elements of its own breakdown.

b. Competitive armaments. The system of the "balance of power," and the absence at this time of any collective responsibility on the part of the community of nations for the protection of its individual members, led naturally to competitive armaments. Each state was called upon to defend its own independence and its own national interests. Each state had to rely upon its own armed forces to assert its claims against another state. Diplomacy was effective to the extent that the military and naval power of a state commanded respect. All critical negotiations were conducted in the atmosphere of what was called "power politics."

Armaments originally created for defensive purposes came to be an end in themselves rather than a means to an end. Nations created great armies and built up great fleets with no specific objective in view. They sought military and naval power for the sake of power. Thus the competition in armaments became in its turn a cause of war.

The paradoxical character of the system of competitive armaments lay in the fact that it became impossible to distinguish between offensive and defensive armaments. Each state was loud in its assertion that its armaments were for purely "defensive" purposes. But other states had not the same confidence in the defensive character of the armaments of neighboring states. The meaning of the term "defensive" obviously depended upon what particular policies or interests a nation had it in mind to defend; so that what was alleged to be defensive by one state was seen to be offensive by another.

The members of the League of Nations recognized in the Covenant that the maintenance of peace required the reduction of armaments. But in spite of efforts to bring about disarmament, in spite of what was accomplished at the conferences of Washington and London, the nations were never able to come to an effective agreement upon this essential condition of permanent peace.

The political interests of the Powers prolonged indefinitely the discussion whether disarmament came prior or subsequent to collective security; whereas the real solution was that the two should proceed side by side. The inability to decide this question made it clear that the conception of collective security contemplated by the League was still in the realm of theory.

That the problem was further aggravated by the traffic in armaments cannot be denied. The manufacture of munitions of war by private or semi-private parties, without regulation of any kind, and their sale in the open market was a disturbing element in international relations. The greed for profits on the part of the armament industry, resorting on occasion to highly reprehensible methods, provoked fear and suspicion between states and added greatly to the growing tenseness of the relations between them.

c. Political imperialism. Intimately associated with the system of the balance of power was the policy of political imperialism pursued during the closing decades of the last century. The Great Powers, led by a variety of motives, chiefly of an economic character, sought to obtain control over backward peoples and undeveloped countries. Thus they created the great

modern colonial empires which served as sources of raw materials for the industry of the mother country, as markets for manufactured goods, and at times also as military and naval bases and as a recruiting ground for armies. Once the first territorial acquisitions were made, it became necessary to increase naval power in order to protect the new lines of communication and commerce, and additional territories had to be annexed in order to defend those originally acquired. Thus colonial expansion knew no limit except that of finding territory and peoples in a condition to be colonized. Rivalry for the possession of colonies gave an added motive to the competition in armaments, and in this way it contributed, both directly and indirectly, to endanger the peace of the world.

If from one point of view colonial imperialism brought a certain degree of material progress to particular colonies and protectorates, its advantages were on the whole more than offset by the subordination of the interests of the native populations to the political objectives of the colonizing powers and by the rivalries that developed between them. With but few exceptions the policy of the Great Powers was inspired by selfish motives, and the interests and welfare of the subject peoples were a secondary consideration.

With the establishment of the League of Nations a new plan was put into practice, which improved the condition of the territories to which it was applied. The system of mandates, administered in the name of the League, was not always true to its original purpose; but the principle underlying it was the right one, and it must be applied to the solution of the problem in the future.

d. Political nationalism. Even before the war of 1914 the spirit of nationalism manifested itself at times in exaggerated forms. Theories of racial supremacy were proclaimed which, in the minds of their advocates, were justification for the right of one people to dominate over other races believed to be inferior. Ideas of this kind doubtless contributed in part to the warlike spirit out of which the conflict grew. But it was not until after the war that nationalism manifested itself in dangerous forms, exaggerating out of all proportion the racial and cultural bonds of certain states and constituting a threat to the general peace.

In spite of the high ideals of international coöperation expressed by the delegates of many of the nations represented at Geneva, it was clear that the governments of a number of the leading nations were far from accepting the objectives of the League Covenant as the basis of their practical policies. Memories of the war were too bitter for many of those who had suffered from it to have confidence in the new system of collective security. Political leaders in the states which had won the war still thought in terms of the permanent repression of the defeated powers; while public opinion in the defeated states thought in terms of undoing the effects of the peace treaties and recovering what they had lost.

All the efforts of enlightened leaders of the League of Nations to develop

the machinery of international organization and to make it an agency for the modification of the inequitable terms of the peace treaties and for the removal of the conditions creating international friction were defeated by the new and more intense spirit of nationalism which developed in the heart of Europe.

States came to concentrate exclusively upon their own immediate interests, to the exclusion of the interests of the community at large. Nationalism was exaggerated to the point where in some cases it became a pathological condition influencing radically both the domestic and the foreign policy of the state. A degraded form of this extreme nationalism, established by minority groups with the aid of force, drew its support from a false ideology, essentially materialistic, which denied the free activity of the human spirit and the right of individual judgment in political matters. In the domestic sphere this form of nationalism repudiated the principle that governments are bound by law; it dominated all the activities of the people, and it reduced the individual citizen to the condition of a mere cog in the wheel of the state. In foreign relations it denied the basic principle of the juridical equality of states; it overrode the rights of other states, and it advocated expansion and conquest. Hence came its idea of world domination, for which it was prepared to use every available means from the infiltration of false doctrines to revolution and war. It was imperialism in a new form, openly resorting to force and violating international treaties without scruple.

This new ideology took deeper root than would have been possible a generation earlier due to the fact that the governments holding those views were able to shut off the sources of public information. Rigorous censorship of the press, a governmental monopoly of radio broadcasting, the suppression of public meetings, and other forms of control made it impossible for public opinion in these countries to have access to sources of information which might have enabled it to form just judgments of the foreign policy pursued by the government. Thus the very wells of thought were poisoned, and political leaders who were promoting false theories of nationalism were able to strengthen their hold upon the loyalty of the people thus deceived as to the true attitude of other countries.

On the other hand the control of the government over education was used to disseminate in the minds of youth false conceptions of patriotism, which made mutual understanding between countries more difficult and created new barriers between them.

In the end the public at large proved to be an easy victim of this propaganda; and suspicion and distrust increased in proportion to economic distress. At this point the political and economic factors that caused the breakdown of law and order became indistinguishable from the social factors, each set of influences reacting upon the other and aggravating its effects.

In line with their control over the sources of public information in their own countries certain governments sought to influence public opinion in

foreign countries, and to that end they set up organized agencies of propaganda whose methods extended from false statements to the distribution of incendiary literature. At the same time these governments attempted to undermine the loyalty which naturalized citizens owed to the country of their adoption, resorting to illegal methods, such as the formation of disguised political clubs. These subversive activities, carried on at times by persons associated with embassies and consulates, constituted acts of moral aggression which, nevertheless, it was difficult to combat without putting into effect general restrictions upon freedom of speech and of the press and of public assembly.

Nationalism carried to such extremes thus became a preponderating factor in bringing on the war.

IV. Economic Factors

a. Economic imperialism. It was in the field of economic interests, however, that imperialism manifested itself in its most acute form. For in the modern state economic interests not only are inseparable from political interests but are in large part the motive force of political action, embracing as they do the raw materials of industry, production, transportation, the sale of goods in domestic and foreign markets, and the financial transactions incident to industry and commerce in general.

The development of industrial machinery during the nineteenth century and the rapid expansion of production during the first decade of the twentieth century led the principal industrial states to seek to obtain sources of the raw materials of industry and markets for their manufactured products. The result was a ruthless competition between them to obtain exclusive control of these raw materials and markets and to assure themselves a privileged position wherever political pressure could be exercised to that end. The competition included also the investment of capital drawn from the domestic economy of the different countries; so that the economic exploitation of colonies, protectorates and zones of influence, when it did not succeed in obtaining a monopoly of raw materials, at least resulted in exclusive opportunities for the investment of capital by citizens of the mother country. Economic exploitation took on a political and strategic character; with the result that political and economic imperialism became parts of a single objective, and the interests and welfare of the peoples of the countries thus exploited became subordinated to the interests of the state exercising control over them.

Moreover, in the pursuance of their efforts to obtain advantages in foreign markets, governments frequently supported their citizens in putting into effect trade practices which were in open violation of the standards of fair competition. The result was that rivalry between the citizens of different countries became rivalry between their governments; and the economic competition of private business companies took on a political character and

gave further impulse to the belief that the interests of one state were fundamentally opposed to those of another state.

b. Economic nationalism. Even before 1914 the great majority of states showed a tendency to restrict the free exchange of goods by the erection of tariff barriers and other obstructions, which frequently created international friction. These measures were used as an important weapon in the struggle attending "power politics." After the war these conditions continued, and an extreme form of nationalism developed, based upon the idea that the only way to increase exports was to eliminate as far as possible the trade of other countries. At the same time it was said that the war had shown the necessity of a greater degree of economic self-sufficiency.

Except for its limited provisions in respect to territories put under mandate, the Covenant of the League of Nations contained no provisions looking to coöperation in the field of internationl economic relations. The new states created by the peace treaties erected tariff barriers which cut across the lines of trade followed in the years before the war. New centres of commerce were thus created at the expense of established industrial communities now separated by national boundaries from their former area of trade. A tendency was observable to abandon the use of the unconditional most-favored-nation clause and to adopt to an excessive degree the policy of fixing quotas for imported goods, putting taxes on exports, laying embargoes, and creating other similar restrictions.

The erection of high tariff walls had the effect of creating a condition of industrial insecurity for states not possessing raw materials within their national boundaries. The economic theory that there should always be a balance of trade in favor of its own commerce led each state to pursue its policies without regard to their effect upon the welfare of other states. No concerted measures were taken to solve the problem of distribution upon an international basis, so that the surplus products of one country might be available to other countries in need of them. The various trade barriers became instruments of economic war and were used as such.

After 1924 conditions improved to some extent. Certain commercial agreements of a temporary nature were replaced by others of longer duration, having in view the promotion of trade upon a freer basis. At the International Economic Conference of 1927, which met under the auspices of the League of Nations, the states represented at the conference declared that it was time to stop raising higher tariff barriers and to reverse the trend in that respect by removing the obstacles to international commerce. Nevertheless the spirit of exaggerated nationalism prevailed, and in some cases it even led to the extreme of making the state itself take over the functions of industry and of foreign trade.

The absence of international coöperation in the field of economic relations made itself felt more acutely when the crisis of 1929 came. Industrial and agricultural production, international debts, tariffs and labor relations had

not been worked out with a long-range view of the general welfare, whether of the individual nation or of the international community, but had been handled with a view to present profits. The effects of the depression were thus intensified. For want of effective international action states tried in vain to meet the crisis. Far from doing so, the conflicting solutions offered only made reconstruction impossible.

Partly as a result of the new trade restrictions and partly as a result of domestic disturbances caused by industrial unemployment and distress, certain political leaders came to believe that only by developing the military forces of their country and being prepared to fight for new "living spaces" was there any hope of relief. In turn the building of new military armaments made greater demands upon the resources of the state and consumed the raw materials that might otherwise have been available to industry. The consequence was the creation of a vicious circle, a sort of ascending spiral, in which the demand for military armaments was justified by the need of raw materials and the need of raw materials became even greater to meet the increasing armaments. Under these conditions political and economic nationalism became part of the same policy; and it was not difficult for certain governments to create in the minds of their peoples a "starvation complex" which raised the fever of nationalism to the danger point.

The failure of the several efforts of the leading powers to secure a comprehensive and effective agreement in respect to military disarmament was not solely due to an absence of confidence in the system of collective security established by the Covenant of the League of Nations. It was due also to the fact that plans of military disarmament were discussed without reference to "economic disarmament." While the discussions at Geneva centered upon the need of a common front against aggression, the delegates of the leading powers failed to give corresponding attention to the sharp rivalries in the field of international commerce and to the bitter antagonisms aroused by national economic policies which sought only the advantage of the particular state at the expense, it might be, of other members of the international community. "Justice" between nations did not extend to economic relations, which were determined by the law that those which were in fortunate possession of the resources of nature were privileged to use those resources for their own exclusive advantage. Peace could not be permanent so long as the nations were engaged in economic war.

V. Social Factors

a. Incomplete realization of social justice. Social justice, in the sense of an equitable distributive system put into effect by means of comprehensive legislation looking to the protection and adequate remuneration of labor and to the promotion of the general welfare without respect of privileged groups, came to claim a place among the technical sciences by the close of the nineteenth century. At the same time what was previously considered to be a

national question in the different European countries was seen to have international implications and to be closely bound up with the economic and political relations of states.

In the years preceding the first World War the welfare of the great body of the people and the standard of living and economic security of the working classes did not reach the level warranted by the industrial development of the period. At the same time conditions within the individual states created an atmosphere unfavorable to effective international coöperation, due to the reaction of domestic conditions upon international relations. This was well understood by the statesmen who created the League of Nations, when they organized at the same time the International Labor Bureau, whose constitution recognized this fact by beginning with the statement that "universal peace can only be established upon the basis of social justice."

The international effects of social injustice are to be seen in the influence of the domestic conditions of the state upon its foreign policy. Many civil wars have had their origin in social evils which might have been cured by more equitable laws. But social injustice may also be a cause of international conflict when it leads a government to go to war in order to distract attention from domestic difficulties. Of recent years we have the case of governments which, taking advantage of the low state of public morale created by economic insecurity and social distress, have set up political dictatorships and, by suppressing free institutions, have succeeded in inciting their people to envy of other countries and in leading them to seek in war what they believed to be their due.

While it is true that in consequence of the more advanced social legislation of the past two decades, supported by the activities of the International Labor Office, the economic status of labor improved in some countries, in other countries the demands of the great masses for social justice remained in large degree unsatisfied. In certain respects the situation took on new and more serious aspects due to the inability, or the unwillingness, of states to organize their domestic economies in terms of world coöperation. It is no exaggeration to say that half of the world's population lived below the minimum level of subsistence, not because the means of a better life were lacking, but because political nationalism no less than economic nationalism prevented the necessary coöperation between states. Industry was not organized at the service of the community, but rather with the object of producing profits for some of its members. There was unbridled competition within each state, and between states a struggle without quarter for the conquest of foreign markets. This system, operating without plan or regulation, may have given work for the time to a larger number of persons; but in the end it had the opposite effect.

The resulting economic insecurity helped to create in certain peoples sentiments of hostility towards the people of other countries as being

responsible for their suffering. Conditions due in part to inadequate domestic planning were held to be due to the deliberate act of foreign governments. The inequality of social conditions between different countries became more glaring. Lower living standards created hatred and suspicion, and the class struggle in certain countries became acute. Extreme poverty existed side by side with great wealth, and the social phenomenon of our times was to be witnessed: millions upon millions demanding in vain the right to work. If domestic peace and order were disturbed as a result, it was too much to expect that permanent peace between nations could be built upon such unstable foundations.

b. Unemployment. Even before the war of 1914 the unequal distribution of work and the widespread unemployment preoccupied the attention of certain governments; but these conditions did not disturb domestic order in such a way or to such an extent as to become an international problem.

During the war of 1914 the problem of unemployment was solved by the great number of men enlisted in military service and by the expansion of industries to meet the needs of war; but after the armistice the problem returned in aggravated form, due to the inability of peace-time industry to give work to the immense number of persons seeking employment.

Unemployment in the succeeding years led to the development of autarchic tendencies, in which some governments sought to find a palliative for the numerous problems confronting them. They found it necessary to create work and to erect barriers against imports; and in seeking to give preference to the native worker they excluded foreigners and closed their doors to the immigrant or subjected him to quotas based upon nationality. This policy provoked reprisals from other states and was one more disturbing element in international relations.

On the other hand the feelings of hostility and distrust created among the unemployed and the most needy groups made it easier to establish autocratic regimes in certain countries, which relied only upon force and not upon the working of free institutions. These governments required an elaborate bureaucracy to assure their position and to carry out the complicated plans called for by their ideas. They set in motion propaganda in favor of their claims against other states in order to arouse their peoples and to distract attention from the difficulties of their domestic situation. They expanded their armament industry in order to assert their claims effectively. This policy had the advantage of offering an artificial solution for the problem of unemployment; so that it became easy for these governments to change the hunger complex into a war complex, and thus to consolidate their hold upon the people. But the labor problem remained unsolved, and domestic difficulties made the security of their systems precarious. Plans of conquest appeared to be the easiest solution for their difficulties. The dilemma appeared to be, in fact, work or war. The old race of armaments was back

again, with resulting lack of confidence between states. It was now too late for the measures of international coöperation which, taken at an earlier date, might have prevented the coming conflict.

Conclusions

The Inter-American Juridical Committee, taking into account the facts above set forth, indicating what the Committee believes to be the main causes of the breakdown of international law and order, and believing it necessary to make its contribution to the determination of the general principles upon which law and order should be based in the future, to the end that a just and permanent peace may be established among the nations, proposes to the Governments of the American Republics the following conclusions:

I. Priority of the moral law and of the fundamental principles of international law derived from it.

Nations must recognize in their mutual relations the priority of the moral law, which is the same for nations as for individuals; and they must make their conduct conform to the fundamental principles derived from that law.

Existing rules of positive law must not be regarded as fixing permanently the *status quo*, but rather as the necessary basis of international order and stability pending the adoption of rules more in accord with the new needs of the international community.

II. Repudiation of the use of force.

War must be repudiated not only as an instrument of national policy, but also as a legalized procedure for the settlement of disputes.

The community of nations, acting through its organized agents, must alone have the right to use force to prevent or resist aggression and to maintain order and respect for law.

Resistance by a nation to aggression must be limited to the defense of its territory pending effective action by the community of nations.

The acts which shall be regarded as constituting aggression must be specifically defined, as well as the conditions calling into effect the right of legitimate self-defense.

III. Unqualified obligation to settle disputes by peaceful methods.

Nations must undertake an unqualified obligation to settle their disputes by peaceful methods.

The various procedures for the peaceful settlement of international disputes must be organized in such a way as to operate automatically and progressively until a final and definitive solution of the controversy has been obtained by means of one or other of the several procedures laid down, or by means of some alternative procedure which the parties in controversy may agree to adopt.

The existing procedures of conciliation and arbitration should be reorganized so as to make them more readily and more promptly accessible.

The jurisdiction of the Permanent Court of International Justice should be

extended, and procedure before the Court should be coördinated with that of regional judicial tribunals, if any should be created; the jurisdiction of these regional tribunals being determined by the place and the subject-matter of the controversy.

IV. Solidarity in the presence of aggression.

Nations have a common and joint obligation to watch over the observance of the fundamental principles of international law, and they must assume a collective responsibility for the maintenance of peace and order.

An act of aggression committed against one nation must be considered as an act of aggression against all the other members of the international community.

When once the aggressor has been determined by the competent organs of the international community, nations shall have no right to remain neutral between the parties in conflict and to treat them upon equal terms.

All nations have the duty to coöperate in making effective the sanctions which the international community may adopt against an aggressor.

V. Modification of the conception of sovereignty.

The sovereignty of the state must be understood in a manner consistent with the supreme necessity of maintaining peace, order and justice in the international community.

In the exercise of their sovereignty nations must recognize and respect the priority of the moral law and of the fundamental principles of international law derived from it.

No nation may claim as an attribute of sovereignty the right to be the judge in its own case or the right to take the law into its own hands and assert its claims by force.

The moral unity of the international community and the effective coöperation of its members call for the coördination of their sovereignty with the fact of their interdependence.

VI. Necessity of a more effective international organization.

The maintenance of law and order and the application and development of specific rules of international conduct demand the creation of some machinery of international government which can represent the will of the entire community and its collective interests rather than the will and the interests of its individual members, and which can carry into effect its decisions.

The period of transition between the close of the war and the establishment of the future international organization must not be prolonged beyond the time that is strictly necessary, and it must be governed as far as possible by the same principles upon which the organization itself is to be based.

VII. Character of the new association of nations.

The international community must be organized on the basis of the cooperation of all nations.

No nation is privileged to remain aloof from the organization thus established.

Whether the organization is to be based upon the League of Nations amended and strengthened, or is to be a new legal institution, it must be so constituted as to reconcile the principle of universality of membership with the existence of regional groups formed by natural bonds of solidarity and common interests.

These regional groups or associations may adopt special rules governing the relations of their members among themselves in matters in which the common interests of the whole international community are not involved.

The functions of the new international organization must be as comprehensive as the political, economic and social needs of the community require. Existing international institutions and treaty agreements must be adjusted to met new conditions and new needs.

VIII. A more effective system of collective security.

The primary objective of the new international organization must be the protection of each and all of its members against acts of violence, so that every nation may rely for its security upon the collective action of the community.

Each nation must consider that it has a vital national interest of its own in the maintenance of international law and order, and that every threat or act of violence against any one member of the community constitutes a direct attack against each and all of them.

IX. Abandonment of the system of a balance of power. Limitation of armaments.

The establishment of an effective system of collective security must put an end to the policy that peace can be secured by a balance of power between opposing groups of states.

Nations must recognize that a just solution of the problem of armaments is an essential condition of an adequate organization of peace.

The limitation of armaments must take place progressively and side by side with the establishment and practical development of the system of collective security, up to the point which is compatible with the maintenance by each state of domestic order and with the fulfillment of its international obligations looking to the collective action of the community.

Nations must not invoke the necessity of self-defense as a ground for increasing their national armaments beyond the extent recognized as justifiable within the system of collective security.

The manufacture of munitions of war should be an exclusive function of the state, the private manufacture and private trade in arms being opposed to the general security.

During the period of transition between the end of hostilities and the definitive establishment of peace, account must be taken of the fact that the

nations which have borne the burden of the war against the aggressors may have to keep their armaments in order to reëstablish order in territories where there is need to do so. But this temporary right must be exercised with the objective of facilitating the creation of the system of collective security which is to follow, keeping in mind at the same time a gradual solution of the problem of the limitation of armaments.

X. Abandonment of political imperialism.

Political imperialism, in the sense of the acquisition of control over the will of weak nations and over undeveloped countries for political as well as for military purposes, must be abandoned.

Colonies and protectorates must be administered in accordance with the principles laid down in the Covenant of the League of Nations and reaffirmed in the Havana Convention, that the well-being and development of their peoples should form a sacred trust of civilization.

XI. Elimination of political nationalism.

An essential condition of the establishment of a permanent peace will be the elimination of the spirit of exaggerated nationalism which concentrates upon the interests of the particular state to the exclusion of the interests of the community at large.

Every effort must be made to get rid of false theories of nationalism which certain governments have made use of in order to create in their peoples a belief in their superiority over other peoples and consequently, as claimed, in their right to impose their culture upon them.

Doctrinal propaganda carried on in a particular state against mutual understanding between nations must be regarded as an offense against the whole community of nations and as a threat to the general peace.

The state exists for the good of its citizens, and it may not deprive them of the rights which a man possesses because of his human personality and not because the state has conferred them upon him.

Political systems which respect human liberties must be recognized as playing an important part in the coöperation of states.

In view of the fact that moral disarmament is an important factor in promoting peace, states should direct their educational institutions as so to increase mutual understanding between them and to develop within their respective territories, and by all means in their power, sentiments of international coöperation and solidarity.

XII. Elimination of economic imperialism.

The community of nations, acting through its appropriate agencies, must supervise the exploitation of undeveloped territories.

These territories must be administered in accordance with the principle of equality of treatment, so that all states may have equal access to the raw materials which they produce and may be able to sell their manufactured goods in the markets of these territories upon equal terms.

A system of free competition should be established in these territories, which will prevent particular states from having exclusive opportunities for the investment of capital and for other forms of economic enterprise, and which will promote the gradual progress of these territories and the well-being of their native populations, while at the same time protecting the interests of the international community.

XIII. Elimination of economic nationalism.

Nations must recognize their economic interdependence, and that in consequence their right to regulate their own economic activities should not be without limitations.

The future international organization must give special attention to the coördination of world economy, and must endeavor to obtain concrete solutions for the problems which it presents, seeking a means of reconciling national self-determination with the predominant interest of the whole community of nations.

Nations must make every effort to lower tariff barriers and remove other restrictions upon commerce, and to increase as far as possible the free and full exchange of articles and services among the members of the international community, so as to lessen as far as possible the inequalities of natural resources and to promote the mutual well-being of their respective peoples.

In order to bring about economic disarmament the system of ruthless competition and trade rivalries must be eliminated, and in its place must be substituted measures of coöperation looking to the general welfare of the international community.

XIV. Elimination of the social factors of war.

Nations must recognize that social justice and the improvement of the conditions of life for the individual citizen have a relation to the maintenance of peace and for that reason must play an essential part in any plans of international reconstruction.

Nations must endeavor to raise the standard of life of their citizens and must guarantee to each individual a degree of economic security which will permit him to live in the sufficiency and freedom from fear necessary to enable him to develop his personality and to enjoy the benefits of spiritual and material freedom to which all men have a right.

The realization of these objectives is primarily the task of each separate state; but only by parallel international action can they be adequately secured.

Nations must organize their national industry so as to meet the needs of all the people and not merely the interests of privileged groups; and while having in mind the interests of their own peoples they must also give consideration to the interests and necessities of the international community.

The social services of the new international organization must be expanded so as to include tasks which are beyond the reach of the individual state.

The work of the International Labor Office must be continued to the fullest possible extent.

Rio de Janeiro
September 5, 1942

(S) AFRANIO DE MELLO FRANCO
(S) F. NIETO DEL RÍO
(S) CHARLES G. FENWICK
(S) C. E. STOLK
(S) P. CAMPOS ORTÍZ

UNITED NATIONS

AGREEMENT FOR UNITED NATIONS RELIEF AND REHABILITATION ADMINISTRATION[1]

Washington, November 9, 1943

The Governments or Authorities whose duly authorized representatives have subscribed hereto,

Being United Nations or being associated with the United Nations in this war,

Being determined that immediately upon the liberation of any area by the armed forces of the United Nations or as a consequence of retreat of the enemy the population thereof shall receive aid and relief from their sufferings, food, clothing and shelter, aid in the prevention of pestilence and in the recovery of the health of the people, and that preparation and arrangements shall be made for the return of prisoners and exiles to their homes and for assistance in the resumption of urgently needed agricultural and industrial production and the restoration of essential services,

Have agreed as follows:

ARTICLE I

There is hereby established the United Nations Relief and Rehabilitation Administration.

1. The Administration shall have power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create agencies and to review the activities of agencies so created, to manage undertakings and in general to perform any legal act appropriate to its objects and purposes.

2. Subject to the provisions of Article VII, the purposes and functions of the Administration shall be as follows:

(a) To plan, coördinate, administer or arrange for the administration of measures for the relief of victims of war in any area under the control of any of the United Nations through the provision of food, fuel, clothing, shelter and other basic necessities, medical and other essential services; and to facilitate in such areas, so far as necessary to the adequate provision of relief, the production and transportation of these articles and the furnishing of these services. The form of activities of the Administration within the territory of

[1] Text by courtesy of the Department of State.

a member government wherein that government exercises administrative authority and the responsibility to be assumed by the member government for carrying out measures planned by the Administration therein shall be determined after consultation with and with the consent of the member government.

(b) To formulate and recommend measures for individual or joint action by any or all of the member governments for the coördination of purchasing, the use of ships and other procurement activities in the period following the cessation of hostilities, with a view to integrating the plans and activities of the Administration with the total movement of supplies, and for the purpose of achieving an equitable distribution of available supplies. The Administration may administer such coördination measures as may be authorized by the member governments concerned.

(c) To study, formulate and recommend for individual or joint action by any or all of the member governments measures with respect to such related matters, arising out of its experience in planning and performing the work of relief and rehabilitation, as may be proposed by any of the member governments. Such proposals shall be studied and recommendations formulated if the proposals are supported by a vote of the Council, and the recommendations shall be referred to any or all of the member governments for individual or joint action if approved by unanimous vote of the Central Committee and by vote of the Council.

ARTICLE II

Membership

The members of the United Nations Relief and Rehabilitation Administration shall be the governments or authorities signatory hereto and such other governments or authorities as may upon application for membership be admitted thereto by action of the Council. The Council may, if it desires, authorize the Central Committee to accept new members between sessions of the Council.

Wherever the term "member government" is used in this Agreement it shall be construed to mean a member of the Administration whether a government or an authority.

ARTICLE III

The Council

1. Each member government shall name one representative, and such alternates as may be necessary, upon the Council of the United Nations Relief and Rehabilitation Administration, which shall be the policy-making body of the Administration. The Council shall, for each of its sessions, select one of its members to preside at the session. The Council shall determine its own rules of procedure. Unless otherwise provided by the Agreement or by action of the Council, the Council shall vote by simple majority.

2. The Council shall be convened in regular session not less than twice a year by the Central Committee. It may be convened in special session whenever the Central Committee shall deem necessary, and shall be convened within thirty days after request therefor by one-third of the members of the Council.

3. The Central Committee of the Council shall consist of the representatives of China, the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America, with the Director General presiding, without vote. Between sessions of the Council it shall when necessary make policy decisions of an emergency nature. All such decisions shall be recorded in the minutes of the Central Committee which shall be communicated promptly to each member government. Such decisions shall be open to reconsideration by the Council at any regular session or at any special session called in accordance with Article III, paragraph 2. The Central Committee shall invite the participation of the representative of any member government at those of its meetings at which action of special interest to such government is discussed. It shall invite the participation of the representative serving as Chairman of the Committee on Supplies of the Council at those of its meetings at which policies affecting the provision of supplies are discussed.

4. The Committee on Supplies of the Council shall consist of the members of the Council, or their alternates, representing those member governments likely to be principal suppliers of materials for relief and rehabilitation. The members shall be appointed by the Council, and the Council may authorize the Central Committee to make emergency appointments between sessions of the Council, such appointments to continue until the next session of the Council. The Committee on Supplies shall consider, formulate and recommend to the Council and the Central Committee policies designed to assure the provision of required supplies. The Central Committee shall from time to time meet with the Committee on Supplies to review policy matters affecting supplies.

5. The Committee of the Council for Europe shall consist of all the members of the Council, or their alternates, representing member governments of territories within the European area and such other members of the Council representing other governments directly concerned with the problems of relief and rehabilitation in the European area as shall be appointed by the Council; the Council may authorize the Central Committee to make these appointments in cases of emergency between sessions of the Council, such appointments to continue until the next session of the Council. The Committee of the Council for the Far East shall consist of all the members of the Council, or their alternates, representing member governments of territories within the Far Eastern area and such other members of the Council representing other governments directly concerned with the problems of relief and rehabilitation in the Far Eastern area as shall be appointed by the Council;

the Council may authorize the Central Committee to make these appointments in cases of emergency between sessions of the Council, such appointments to continue until the next session of the Council. The regional committees shall normally meet within their respective areas. They shall consider and recommend to the Council and the Central Committee policies with respect to relief and rehabilitation within their respective areas. The Committee of the Council for Europe shall replace the Inter-Allied Committee on European post-war relief established in London on September 24, 1941 and the records of the latter shall be made available to the Committee for Europe.

6. The Council shall establish such other standing regional committees as it shall consider desirable, the functions of such committees and the method of appointing their members being identical to that provided in Article III, paragraph 5 with respect to the Committees of the Council for Europe and for the Far East. The Council shall also establish such other standing committees as it considers desirable to advise it, and, in intervals between sessions of the Council, to advise the Central Committee. For such standing technical committees as may be established, in respect of particular problems such as nutrition, health, agriculture, transport, repatriation, and finance, the members may be members of the Council or alternates nominated by them because of special competence in their respective fields of work. The members shall be appointed by the Council, and the Council may authorize the Central Committee to make emergency appointments between sessions of the Council, such appointments to continue until the next session of the Council. Should a regional committee so desire, subcommittees of the standing technical committees shall be established by the technical committees in consultation with the regional committees, to advise the regional committees.

7. The travel and other expenses of members of the Council and of members of its committees shall be borne by the governments which they represent.

8. All reports and recommendations of committees of the Council shall be transmitted to the Director General for distribution to the Council and the Central Committee by the secretariat of the Council established under the provisions of Article IV, paragraph 4.

ARTICLE IV

The Director General

1. The executive authority of the United Nations Relief and Rehabilitation Administration shall be in the Director General, who shall be appointed by the Council on the nomination by unanimous vote of the Central Committee. The Director General may be removed by the Council on recommendation by unanimous vote of the Central Committee.

2. The Director General shall have full power and authority for carrying out relief operations contemplated by Article I, paragraph 2 (a), within the limits of available resources and the broad policies determined by the Council or its Central Committee. Immediately upon taking office he shall in conjunction with the military and other appropriate authorities of the United Nations prepare plans for the emergency relief of the civilian population in any area occupied by the armed forces of any of the United Nations, arrange for the procurement and assembly of the necessary supplies and create or select the emergency organization required for this purpose. In arranging for the procurement, transportation, and distribution of supplies and services, he and his representatives shall consult and collaborate with the appropriate authorities of the United Nations and shall, wherever practicable, use the facilities made available by such authorities. Foreign voluntary relief agencies may not engage in activity in any area receiving relief from the Administration without the consent and unless subject to the regulation of the Director General. The powers and duties of the Director General are subject to the limitations of Article VII.

3. The Director General shall also be responsible for the organization and direction of the functions contemplated by Article I, paragraphs 2 (b) and 2 (c).

4. The Director General shall appoint such Deputy Directors General, officers, expert personnel, and staff at his headquarters and elsewhere, including field missions, as he shall find necessary, and he may delegate to them such of his powers as he may deem appropriate. The Director General, or upon his authorization the Deputy Directors General, shall supply such secretariat and other staff and facilities as shall be required by the Council and its committees, including the regional committees and subcommittees. Such Deputy Directors General as shall be assigned special functions within a region shall attend meetings of the regional standing committee whenever possible and shall keep it advised on the progress of the relief and rehabilitation program within the region.

5. The Director General shall make periodic reports to the Central Committee and to the Council covering the progress of the Administration's activities. The reports shall be made public except for such portions as the Central Committee may consider it necessary, in the interest of the United Nations, to keep confidential; if a report affects the interests of a member government in such a way as to render it questionable whether it should be published, such government shall have an opportunity of expressing its views on the question of publication. The Director General shall also arrange to have prepared periodic reports covering the activities of the Administration within each region and he shall transmit such reports with his comments thereon to the Council, the Central Committee and the respective regional committees.

ARTICLE V

Supplies and Resources

1. In so far as its appropriate constitutional bodies shall authorize, each member government will contribute to the support of the Administration in order to accomplish the purposes of Article I, paragraph 2(a). The amount and character of the contributions of each member government under this provision will be determined from time to time by its appropriate constitutional bodies. All such contributions received by the Administration shall be accounted for.

2. The supplies and resources made available by the member governments shall be kept in review in relation to prospective requirements by the Director General, who shall initiate action with the member governments with a view to assuring such additional supplies and resources as may be required.

3. All purchases by any of the member governments, to be made outside their own territories during the war for relief or rehabilitation purposes, shall be made only after consultation with the Director General, and shall, so far as practicable, be carried out through the appropriate United Nations agency.

ARTICLE VI

Administrative Expenses

The Director General shall submit to the Council an annual budget, and from time to time such supplementary budgets as may be required, covering the necessary administrative expenses of the Administration. Upon approval of a budget by the Council the total amount approved shall be allocated to the member governments in proportions to be determined by the Council. Each member government undertakes, subject to the requirements of its constitutional procedure, to contribute to the Administration promptly its share of the administrative expenses so determined.

ARTICLE VII

Notwithstanding any other provision herein contained, while hostilities or other military necessities exist in any area, the Administration and its Director General shall not undertake activities therein without the consent of the military command of that area, and unless subject to such control as the command may find necessary. The determination that such hostilities or military necessities exist in any area shall be made by its military commander.

ARTICLE VIII

Amendment

The provisions of this Agreement may be amended as follows:

(a) Amendments involving new obligations for member governments shall require the approval of the Council by a two-thirds vote and shall take effect for each member government on acceptance by it;

(b) Amendments involving modification of Article III or Article IV shall take effect on adoption by the Council by a two-thirds vote, including the votes of all the members of the Central Committee;

(c) Other amendments shall take effect on adoption by the Council by a two-thirds vote.

ARTICLE IX

Entry into Force

This Agreement shall enter into force with respect to each signatory on the date when the Agreement is signed by that signatory, unless otherwise specified by such signatory.

ARTICLE X

Withdrawal

Any member government may give notice of withdrawal from the Administration at any time after the expiration of six months from the entry into force of the Agreement for that government. Such notice shall take effect twelve months after the date of its communication to the Director General subject to the member government having met by that time all financial, supply or other material obligations accepted or undertaken by it.

IN WITNESS WHEREOF, this Agreement is signed by the following representatives, duly authorized for that purpose by their respective Governments or Authorities.

DONE in Washington this ninth day of November, one thousand nine hundred forty-three, in the English language, the original to be deposited in the archives of the Department of State of the United States of America, and certified copies thereof to be furnished by the Government of the United States of America to each of the Governments and Authorities on whose behalf this Agreement is signed.[1]

[1] Agreement signed by: the Commonwealth of Australia, Belgium, Bolivia, the United States of Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, the French Committee of National Liberation, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Liberia, Luxembourg, the United Mexican States, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippine Commonwealth, Poland, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay, Venezuela, Yugoslavia.—ED.

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JAMES BROWN SCOTT, 1866–1943 *

By GEORGE A. FINCH
Editor-in-Chief

Sensing that it might be an epilogue, as in fact it turned out to be, to his life's work, Dr. Scott on April 1, 1939, wrote in the preface to the last of a long list of legal and scholarly volumes which bear his name as author or editor, as follows: "For nearly half a century, from the time of entering Harvard College until the present day, I have been deeply interested in the fundamental conceptions of law and of the state; and in later years it has been my good fortune to have had practical experience with the law of the state, and especially with the law of the international community."[1] To give a brief account of any busy person's life of fifty years would be difficult; to attempt to do so adequately for a man of Dr. Scott's dynamic personality, vivid imagination, keen intellect, tireless energy, cultured mind, and human soul seems almost futile; for each of his active years one might write a separate article and not overdo the task.

Scholar, teacher and expounder of the law, author or editor of some thirty separate works and general editor of thirty-five titles in series, joint editor of ten more, writer of articles too numerous to mention, and speaker on hundreds of occasions for which he has left published or manuscript records, founder of a school of law, founder and editor of a journal of international law, co-founder of an academy of international law, advocate and successful promoter of an international court of justice, organizer of two international institutes and two societies, government legal adviser and jurisconsult, delegate to ten official international conferences and attendant at many more unofficial international gatherings, member of eight official international commissions, recipient of seventeen honorary degrees from colleges and universities in the United States, Canada, Latin America, England and Europe, decorated by ten foreign governments—throughout his years of ceaseless and many-sided activities, Dr. Scott was inspired by one all-pervading ideal which burned from his heart into everything he applied his mind or laid hands to—that ideal was *Justice!* On the title page of one of his earliest volumes he quoted Daniel Webster: "Justice is the great interest of man on earth."[2] The justice which Dr. Scott believed in was not merely

* This article will serve as a sketch in part of a complete biography which Dr. Scott requested the writer to prepare. He would appreciate having called to his attention any inaccuracies or omissions which Dr. Scott's friends or colleagues may note, and any other incidents in Dr. Scott's life about which they may have information.

[1] *Law, The State, and The International Community: A Commentary on the Development of Legal, Political, and International Ideals.* New York: Columbia University Press, 1939.

[2] *Cases on Quasi Contracts.* New York: Baker, Voorhis & Co., 1905.

between man and man, but between men and women, or, as he expressed it later in life, "Equality in all human relationships."[3] After a few years' experience in the practical conduct of international relations, his concept of justice evolved from the interest of the individual to that of the nation. This development in his thinking was again shown upon the title-page of a volume published in 1909 which he illumined with a quotation from Albert Gallatin: "The true honor and dignity of the nation are inseparable from justice."[4] This kind of justice he maintained should be measured by the same standard of morality for the state as for the individual.[5] Finally, his concept of justice expanded to global proportions and his favorite quotation became that from the French moralist Joubert: "Might and right control everything in the world; might, until right is ready."

From his birth at Kincardine, Ontario, Canada, on June 3, 1866, of American parents temporarily visiting that town, Dr. Scott seemed predestined to an international future in which the crossing of boundary lines would be a common occurrence. After a childhood in Philadelphia, the home of his parents, he entered Harvard College from which he graduated *summa cum laude* with the degrees of A.B. in 1890 and A.M. in 1891. Awarded a Parker fellowship, he specialized in international law until 1894, studying in the meantime at Berlin, Heidelberg, and Paris. To recuperate his health while a student in Europe, he went to Egypt in 1893. On this trip he met Dr. Nicholas Murray Butler, then a professor on sabbatical leave from Columbia University, and its President for the last forty-three years. A lifelong friendship between them was begun which had an important influence upon Dr. Scott's future career.

Following the completion of his studies in Europe, Dr. Scott returned to the United States, and, attracted by the climate of Southern California, he went to Los Angeles and practiced law from 1894 to 1899. The constructive instinct of his nature began immediately to develop, for in 1896 he organized the Los Angeles Law School and was its dean for three years. It is now the Law Department of the University of Southern California. Upon the outbreak of the Spanish-American War in 1898, he enlisted as a private in the 7th Regiment of California Volunteers and was mustered out as a corporal. He left California in 1899 to become Dean of the College of Law of the University of Illinois. He accepted a professorship at the Law School of Columbia University in New York City in 1903 where he remained until appointed Solicitor for the Department of State in 1906. From this position he resigned in 1911 to become Secretary and Director of the Division of International Law of the Carnegie Endowment for International Peace.

[3] Proceedings of American Society of International Law, 1931, p. 28.

[4] *The Hague Peace Conferences of 1899 and 1907.* Baltimore: The Johns Hopkins Press, 1909.

[5] See address, "A Single Standard of Morality for the Individual and the State," Proceedings of American Society of International Law, 1932, p. 10.

Throughout his career, however, in government service and with the Endowment, Dr. Scott insisted upon retaining an academic connection where he could teach and have contact with the younger generation whom he regarded as a constant source of inspiration and most of whom venerated him as followers at the feet of a master. Besides many occasional lectures and courses which he was invited to deliver, not only in his own country but abroad,[6] Dr. Scott occupied chairs at nearby universities which he was able to hold without interference with his daily duties in Washington. From 1906 to 1911 he taught law and international law at George Washington University, Washington, and from 1908 to 1916 he was lecturer on international law at Johns Hopkins University, Baltimore. From 1921 to 1940 he occupied the chair of international law and international relations at the Georgetown School of Foreign Service, Washington, and from 1933 to 1940 he was professor of international law, jurisprudence, and Roman law in Georgetown University Law School. At the 142nd annual commencement of this university held June 9, 1941, a few days after Dr. Scott had reached his 75th birthday, he was made Professor Emeritus and cited by the President and Directors "in grateful memory of twenty years rich in fruits of wisdom, scholarship, and loyalty."

CASEBOOK ON INTERNATIONAL LAW

While Dr. Scott was Dean of the College of Law of the University of Illinois, the President of the University was Dr. Andrew Sloan Draper, who had been a Judge of the Court of Commissioners of Alabama Claims. Association with Dr. Draper no doubt rekindled in Dr. Scott his earlier interest in the subject of international law, for it was while there he edited and published his first *Casebook on International Law*.[7] The volume was dedicated to President Draper. Originally planned as a revision of *Cases and Opinions on International Law* published in 1893 by Freeman Snow, Dr. Scott's former instructor in international law at Harvard University, the changes made were such that it was decided to issue the revision as an independent work. The cases were selected from decisions of English and American courts with a syllabus [8] and annotations. As this work indicates Dr. Scott's early ideas on the place of international law in the system of modern jurisprudence, a brief quotation from the preface will be of interest in comparing his later opinions on this subject:

> The idea underlying this volume is that international law is part of the English common law; that as such it passed with the English colonists

[6] For two of these trips abroad, see his report as Carnegie Exchange Professor in 1927 to the Universities of Habana, Chile, Buenos Aires, and Montevideo, in Latin America, and to the University of Salamanca, Spain. Carnegie Endowment Year Book, 1928, pp. 108–120. See also, p. 212, *infra*, concerning his trip to Germany in 1928 as Visiting Carnegie Professor.

[7] *Cases on International Law.* Boston: Boston Book Co., 1902. Reissued by the West Publishing Co., St. Paul, Minn., in 1906.

[8] Prepared by William C. Dennis, then assistant professor of law, University of Illinois.

> to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic. Municipal law it was in England; municipal law it remained in the United States. No opinion is expressed on the vexed question whether it is law in the abstract; our courts, state and federal, take judicial cognizance of its existence, and in appropriate cases enforce it, so that for the American student or practitioner it is domestic or municipal law.

A second edition was published in the American Casebook Series in 1922.[9] In his expanded preface to this edition Dr. Scott quoted with approval Sir Henry Maine's statement as to the binding force of international law, namely, that "the state which disclaims the authority of international law places itself outside the circle of civilized nations." [10] Writing after the first World War, Dr. Scott commented: "International law seems to have stood fairly well the strain of war. It is no doubt true that the belligerent practices of nations have not squared with their peaceful professions. Nevertheless the law of nations emerges from the World War as a system with foundations unimpaired, although the structure bears outward marks of violence and unsightly scars which only time can cover." But, he continued, "whether we admit it with open eyes, or ostrich-like bury our heads in the sand, there is such a thing as justice, independent of the state, above it and beyond it, although the formulation of its principles may change according to time, place, and circumstances." "From this justice," he concluded "nations must derive their rules of law." He ended this preface with the wish "that members of the profession in foreign countries examine the decisions of their own courts, the awards of mixed commissions and sentences of arbitral tribunals in whose cases their respective governments have special interest, and produce collections of cases, not only for the benefit of the profession to which they belong, but also for the purpose of instruction in the law schools, universities, and other seats of learning in their respective states."

The last edition of the *Casebook on International Law* [11] appeared in 1937. In editing it Dr. Scott enlisted the aid of a former student whose name appears upon the title page. In this preface, Dr. Scott goes all the way in support of the legal nature of international law. "The legal nature of the law of nations," he says, "has now been sufficiently demonstrated both to justify and to require the teaching of international law as a branch of legal science in the law schools not merely of the United States but of every country in the international community." Accordingly, "in the present edition, international law is not developed merely by English and American decisions, but by those of some sixty sovereign nations of the world," as well as by cases of arbitration. This arrangement, he explained, is "grounded upon the

[9] *Cases on International Law.* St. Paul: West Publishing Co., 1922.

[10] *International Law.* London, 1888, p. 38.

[11] *Cases on International Law.* By James Brown Scott and Walter H. E. Jaeger. St. Paul: West Publishing Co., 1937.

belief that arbitral decisions are essentially judicial decisions" and that "municipal courts everywhere, upon assuming jurisdiction of a case involving international law, treat that law as the municipal law of the country in which the suit is brought, in the sense that international law forms a part of the municipal legal system of every sovereign member of the international community. Even a slight familiarity with foreign cases involving the law of nations," he continued, "will suffice to show that, although they are more or less conditioned in form by local procedure and in substance by local law, they are nevertheless ultimately decided in accordance with the rules and precepts of international law. The stream is indeed everywhere colored by the soil through which it reaches the sea, but the sea itself is international. . . . Slowly, almost imperceptibly throughout the centuries, the law of nations has won recognition and acceptance as true law."

The emergence of international law from the mists of the past to the light of the present had been previously described by Dr. Scott in an earlier volume, the first which he published not as a professor for academic use in the classroom, but for practical use by statesmen and publicists:

> From the cell of the cloister international law passed into the study of the philosopher, the jurist, and the scholar; from the study it entered the cabinets of Europe, and for two centuries and more a recognized system of international law has determined the foreign relations of nations; from the cabinet to courts of justice, where the rights of nations as well as individuals have been debated and enforced; and finally, from the court room international law has made its way to the people, who, in last resort, dominate court and cabinet, and enlist in their service scholar as well as priest.[12]

A year later in another early volume he stated fundamental postulates of international law accepted by few of that generation but universally proclaimed today by all who are seeking to curb unjustifiable national ambitions and promote international coöperation as the means of achieving law and order in a lawless world: "The independence of the state is the very postulate of international law; but the solidarity of interest has made itself felt to such a degree that nations have yielded and must in the future yield something of their absolute liberty and independence, just as a citizen yields his absolute freedom for the benefit of society, of which he is a part."[13]

TEACHING LAW BY THE CASEBOOK METHOD

During his professorship at the Law School of Columbia University in New York City, Dr. Scott edited a volume of *Cases on Quasi Contracts*,[14] and two volumes of *Cases on Equity Jurisdiction*.[15] His attachment to the case-

[12] *Texts of the Peace Conferences at The Hague.* Boston: Ginn & Co., 1908, Introduction, p. x.

[13] *The Hague Peace Conferences of 1899 and 1907, ibid.*, Vol. I, p. 5.

[14] Previously cited, footnote 2. In this work he was assisted throughout by Mr. J. Reuben Clark, Jr., then a member of the New York Bar.

[15] New York: Baker, Voorhis & Co., 1906.

book method of teaching law, in which he had been indoctrinated at Harvard, and his success in publishing three casebooks within four years, encouraged him to undertake the promotion of a more general acceptance of this method. He urged that the lecture system should be discarded "because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance." He boldly predicted that the lecture system was doomed. He interested the West Publishing Company, law publishers of St. Paul, Minn., in his plans, and in 1908 the American Casebook Series was started with Dr. Scott as the General Editor. In his preface to the series, the General Editor announced "a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. . . . The collection will develop the law historically and scientifically." Thus, he said, "the law will be presented as an organic growth, and the necessary connection between the past and the present will be obvious." The preparation of the casebooks was to be entrusted to "experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection."[16] When he gave up the general editorship of the series in 1915, he had arranged for and had seen actually published fourteen volumes on the subjects of Bills, Carriers, Common Law Pleading, Constitutional Law, Criminal Law, Criminal Procedure, Damages, Insurance, Partnership, Principal and Agent, Persons and Domestic Relations, Suretyship, Trusts, Wills, Descent and Administration. By that time he had also had the satisfaction of reading in the Report on Legal Education published by the United States Bureau of Education in 1914, that "The case method is today the principal method of instruction in the great majority of the schools of this country," thus virtually seeing the fulfilment of his prior prediction of the doom of the lecture system of law teaching.

THE AMERICAN SOCIETY AND JOURNAL OF INTERNATIONAL LAW

At about the time he edited his first casebook on international law, Dr. Scott conceived the idea of publishing a journal of international law, for he tells us that when he was invited to a chair of law in the Columbia University Law School, which was in 1903, while he was still at Illinois, "President Draper, of the University of Illinois, was anxious to have me remain and he was willing to make certain concessions, none of which interested me because of their financial character. I stated that I should be glad to remain . . . if he would request the trustees of the University of Illinois to permit the establishment of a journal of international law. He said that he did not

[16] Preface which appeared in the volumes of the American Casebook Series published while Dr. Scott was General Editor.

see the feasibility of such a journal. Therefore, I accepted the appointment to Columbia University which had been offered to me."[17] Whether or not Dr. Scott attempted to start a journal of international law at Columbia University is not known, but the annual meeting of the Lake Mohonk Conference on International Arbitration held in the spring of 1905, while he was still a professor at Columbia, obviously seemed propitious to him to launch his project, for, to use his own words, "it appeared from informal discussion and exchange of views, among the various members present, that a strong desire existed for the formation of a society or association for the advancement of international law and for the establishment of a periodical in English devoted to the interests of international law in this country. An informal committee, composed of Messrs. George W. Kirchwey, Robert Lansing, and James Brown Scott, met on Thursday afternoon, June 1, to consider the feasibility of organizing such a society." The committee determined to take the sense of the Conference upon the proposal. A resolution introduced by Mr. Kirchwey committing the Conference to "favor the movement to establish a society of international law in the United States and of an American journal of international law," after consideration by a committee, received the unanimous endorsement of the Conference. In the meantime, upon the invitation of Judge George Gray, President of the Conference, twenty-four members specially interested in the project held a meeting and appointed a committee to draft a constitution and issue a call for a subsequent meeting to perfect the organization. Dr. Scott was elected Secretary and Treasurer. At subsequent meetings of the Committee on Organization, which was enlarged from time to time, a constitution was drafted which was adopted on January 12, 1906, at a meeting in the rooms of the Bar Association of the City of New York. A plan for the publication of a journal of international law was drafted and presented by Dr. Scott. At the first meeting of the Executive Council of the Society held in Washington on January 29, 1906, Dr. Scott was elected Recording Secretary. At this meeting he again presented his plan for the publication of a journal by the Society. The Executive Council met the second time at Lake Mohonk on June 1, 1906. As this date may be considered the birthday of the AMERICAN JOURNAL OF INTERNATIONAL LAW, it will be more interesting to read the proceedings as prepared by Dr. Scott himself:

> The business taken up at this meeting was the definite arrangement to launch the Journal of International Law as proposed by Mr. James Brown Scott in his outline read at a previous meeting. Upon motion of John W. Foster, seconded by David J. Brewer, Mr. Scott was appointed Managing Editor of the American Journal of International Law and authorized to publish the same as the organ of the American Society of International Law. Mr. Scott was further authorized to draw upon the Treasurer for $600 per year, or any necessary amount not to exceed that sum, for the purposes of clerical assistance in editing

[17] Proceedings of the American Society of International Law, 1931, pp. 242–243.

the proposed Journal. The Managing Editor was also given power to name an editorial board of not less than seven to coöperate with him in the editing of the Journal. The meeting then adjourned.[18]

The American Society of International Law held its first annual meeting in Washington, April 19–20, 1907. In opening the session, Mr. Elihu Root, then Secretary of State and the Society's first and only President for seventeen consecutive years, foresaw with prophetic vision the Society's future usefulness in fostering the study of international law and promoting the establishment of international relations on the basis of law and justice, as the Society in its Constitution had defined its objects:

> In opening this meeting of the American Society of International Law, which I hope will be the first of many meetings in unbroken succession to continue long after we personally have ceased to take part in affairs, let me welcome you to the beginning of your labors for a more thorough understanding of this important and fascinating subject. It is impossible that the human mind should be addressed to questions better worth its noblest efforts, offering a greater opportunity for usefulness in the exercise of its powers, or more full of historical and contemporary interest, than in the field of international rights and duties. The change in the theory and practice of government which has marked the century since the establishment of the American Union has shifted the determination of great questions of domestic national policy from a few rulers in each country to the great body of the people, who render the ultimate decision under all modern constitutional governments. Coincident with that change the practice of diplomacy has ceased to be a mystery confined to a few learned men who strive to give effect to the wishes of personal rulers, and has become a representative function answering to the opinions and the will of the multitude of citizens, who themselves create the relations between states and determine the issues of friendship and estrangement, of peace and war. Under the new system there are many dangers from which the old system was free. The rules and customs which the experience of centuries had shown to be essential to the maintenance of peace and good understanding between nations have little weight with the new popular masters of diplomacy; the precedents and agreements of opinions which have carried so great a part of the rights and duties of nations toward each other beyond the pale of discussion are but little understood. The education of public opinion, which should lead the sovereign people in each country to understand the definite limitations upon national rights and the full scope and responsibility of national duties, has only just begun. Information, understanding, leadership of opinion in these matters, so vital to wise judgment and right action in international affairs, are much needed. This Society may serve as a *collegium*, in the true sense of the word, in which all who choose to seek a broader knowledge of the law that governs the affairs of nations may give each to the other the incitement of earnest and faithful study and may give to the great body of our countrymen a clearer view of their international rights and responsibilities.[19]

[18] The foregoing narration is taken from the History of the Organization of the American Society of International Law, Proceedings of First Annual Meeting, 1907, pp. 23–38. The plan for the publication of the JOURNAL may be found on p. 29.

[19] *Ibid.*, pp. 43–44.

When Mr. Root retired as President of the Society in 1924, Dr. Scott likewise retired as Recording Secretary. During this whole period of seventeen years, Dr. Scott participated actively in the conduct of the affairs of the Society, in arranging the programs of the annual meetings, and often added to the interest and value of the discussions by taking part in them. He served as Vice-President from 1924 until 1929 when he was elected President. For ten years thereafter he presided at the annual meetings and made a series of informative and scholarly presidential addresses which are printed in the annual Proceedings. In 1939, he was elected Honorary President of the Society, which position he retained until his death.

Following the authorization of the Executive Council on June 1, 1906, above recorded, Dr. Scott succeeded in launching the AMERICAN JOURNAL OF INTERNATIONAL LAW in January, 1907. In order to assure the appearance of the first number, Dr. Scott advanced from his personal funds the necessary sum, amounting to about $1,700, which was later repaid in full by the Society.[20] Beginning in 1909, Dr. Scott's title was changed to Editor-in-Chief of the JOURNAL and it appeared under his name in that capacity until he was made Honorary Editor-in-Chief in 1924. The quarterly issues contained editorial comments based upon his intelligent grasp of current international happenings and their historical background. On some of these questions he spoke from intimate knowledge because of his official association with the events involved. Many of the articles contributed by others were due to his world-wide personal friendships and associations.

Twice during the long existence of the Society and JOURNAL Dr. Scott had the happiness and privilege of participating in informal functions celebrating their unusual success. At a meeting held on December 30, 1915, Dr. Scott called attention to the fact that "we have successfully passed the first decade of our existence." The finances of the Society, he said, "have been so carefully husbanded that all expenses of the Society have been paid without the levying of an assessment," and the "AMERICAN JOURNAL OF INTERNATIONAL LAW has appeared for the past nine years without requiring an assessment of any kind." He was happy to say, in conclusion, "that there is a modest balance to the credit of the Association, in bank, of the sum of approximately $7,000."[21] It remained for Mr. Root, as President of the Society, to dwell upon some of the results which had been achieved, for he added to Dr. Scott's remarks the following statement: "A year or so ago, in conversation with one of the most distinguished authorities in international law, a professor in one of the great English universities, he told me that the JOURNAL published by this Society was in his opinion, and in the general opinion as he observed it,

[20] See his report to the Executive Committee, Dec. 12, 1908, which he concluded with the statement that the JOURNAL's success during his two years' stewardship "is due in no small measure to the encouragement and coöperation of Messrs. Root, Straus, Anderson and Lansing." Mss. Minutes of the Society.

[21] Proceedings of American Society of International Law, 1915, p. 137.

the best journal of international law that had ever been published."[22] At the annual meeting of the Society held in 1916 Mr. Root again referred to the achievements of the Society. First, as to the great change of conditions which had taken place, he said:

> Ten years ago all the governments of the world professed unqualified respect and obedience to the law of nations, and a very small number of persons not directly connected with government knew or cared anything about it. In this country at least international law was regarded as a rather antiquated branch of useless learning, diplomacy as a foolish mystery, and the foreign service as a superfluous expense. Now that governments have violated and flouted the law in many ways and with appalling consequences, the people of this country at least have begun to realize that observance of the law has a real and practical relation to the peace and honor of their own country and their own prosperity. They are beginning to take an interest in the subject, to discuss it in the newspapers, to inquire how observance of the law may be enforced. There appears a dawning consciousness that a democracy which undertakes to control its own foreign relations ought to know something about the subject.

He then proceeded to comment upon the contribution which the Society and its JOURNAL had made toward the education of the American people in the field of international relations:

> If we had not established this Society ten years ago to study and discuss and spread a knowledge of international law it would surely be demanded now, and we may be certain that our annual public discussions and the publication of the admirable JOURNAL which we have always maintained, with its definite and certain information upon international events, its interesting and well informed discussion of international topics, and its supplements, with their wealth of authentic copies of international documents, have contributed materially towards fitting the people of our country to deal with the international situations which are before them.[23]

The twenty-fifth anniversary of the Society and JOURNAL was celebrated at the annual meeting held in Washington in 1931 at an informal luncheon over which Dr. Scott then presided as President of the Society and Editor-in-Chief of the JOURNAL. Mr. Charles Noble Gregory, one of the small group which shared in the founding of the Society in 1905–1906, referred to "the indefatigable leadership of our honored President, whose labors have been those of a hundred men and whose accomplishments have been those of a thousand." The publication of the Society's JOURNAL, Mr. Gregory believed, had rendered "the very highest service not only to our own country but to the world." "We have made the consideration of international affairs upon lines of *justice, justice, justice,*—that great and controlling factor in life," he said, "a matter of common and general interest." Dr. David

[22] Proceedings of American Society of International Law, 1915, p. 138.
[23] *Ibid.*, 1916, pp. 1–2.

Jayne Hill, who was American Minister at The Hague in 1907 and met Dr. Scott there as adviser of the American delegation to the Second Peace Conference, paid him the following tribute:

> As I look back over these 25 years of the existence of the JOURNAL, I have seen it grow in value and in authority. I cannot conceive of any leadership that could have accomplished more or even that could have accomplished so much, because here was a background of adequate learning, of absolute zeal and devotion, and above all a permanent and deeply-rooted idea that justice, if we could only ascertain what it is and how it is to be determined and applied, should rule the nations as well as individual men.

The next to reminisce on the twenty-five years of the Society's existence was Mr. George W. Wickersham, who was Attorney General of the United States while Dr. Scott was Solicitor for the State Department:

> I have always marveled that this JOURNAL has maintained such high excellence and has had such an increasing influence and position in international thought, but I reflect that Horace Walpole once said that virtue is the compensation given to the poor for the lack of riches. The coöperative effort of a body of men giving their services without reward to this great task, for a society that had very little in the way of material resources, has eventuated in establishing a journal of primary importance in the world touching the subjects with which it concerns itself, until today the JOURNAL of this Society enjoys an authority second to none and has a practical adaptability and usefulness which I think is primary over all others. My interest in that work has been quickened by the fact that its direction was in the hands of a man whom I first met some forty-odd years ago and with whom I have enjoyed a friendship ever since which has been one of the bright things in my life and experience.

One who rightfully classed himself as a younger member but who had joined the Society when it was organized, Mr. Arthur K. Kuhn, referred to the service of the Society and JOURNAL in providing an opportunity for the trained legal minds of the nation to work in common to develop and promote the best and highest ideals in international law. This, he thought, was the outstanding contribution which they had made to the life of the nation. Turning to Dr. Scott, Mr. Kuhn said: "In organizing such a group, placing it upon an active basis, and continuing with its labors over a quarter of a century in the notable manner in which you and your associates have done, you have made a memorable contribution to the life and work of our nation and our Government." Dr. Leo S. Rowe, Director of the Pan American Union, then added his tribute to the services which the Society and its President had rendered in awakening interest throughout the countries of Latin America in the study of international law and especially in the work of the Pan American Union.

As the presiding officer, it was necessary for Dr. Scott to bring these interesting proceedings to a close. In his own manner of speech he reminded

his friends that the work had been coöperative, in which perhaps he had borne the laboring oar. And then, with characteristic familiarity with the classics, he referred to a memorable incident in the history of Greece:

> There was an occasion upon which the friends of one Miltiades, who was in command of the coming of Hellas, at the time in question, wished to erect a monument to him. The Greeks, a very intelligent people, a very reasonable people, replied that they would be delighted to do so if Miltiades could prove that he was the only person at Marathon. The statue has still to be erected.[24]

Dr. Scott continued to take a keen interest in the JOURNAL after his active work as Editor-in-Chief had ceased, and attended regularly the annual luncheons of the Board of Editors. After his retirement as President in 1939 he was present at the two following annual meetings of the Society. Illness prevented his further attendance.

The Society and its JOURNAL, bearing the motto engraved upon their seal *Inter Gentes Jus et Pax* which so accurately expresses the great objective of Dr. Scott's life, will undoubtedly remain among the outstanding memorials to the success of his devoted life's work.

SOLICITOR FOR THE DEPARTMENT OF STATE

Dr. Scott has told us in his own words how he happened to be appointed Solicitor for the Department of State in 1906 by Secretary of State Elihu Root:

> My acquaintance with Mr. Root was accidental, during the time when I was professor of law in Columbia University Law School. A cold which had settled in my larynx had both enlarged and stiffened the vocal cords, so that it was difficult for me to speak above a whisper—or at any rate to address a class. It so happened at that time that the Solicitor—now termed the "Legal Adviser"—of the State Department had but recently resigned. I therefore wrote a letter to Mr. Root, then Secretary of State, to the effect that I would be glad to accept the position, if he cared to appoint me. In the letter I intimated that I did not need the position; that I had had no practical experience in international relations, although my hobby was international law, and that I would not care to have the position if it were reserved for political appointment.

The letter, in Dr. Scott's words, "concluded my somewhat impertinent application—as I now look upon it—by expressing the hope that the letter would reach his eye before it (meaning the letter) was thrown into the waste-basket." Dr. Scott further informs us that he learned later "that Mr. Root was so amused at the nonchalant tone of the letter that he took it to the next Cabinet meeting and read it aloud; whereupon President Roosevelt—the first of the line—thumped the table with his hand and said: 'Elihu, we must appoint that man.'" After a personal interview with Mr. Root

[24] The foregoing account of the celebration of the twenty-fifth anniversary of the Society and JOURNAL is taken from the Proceedings of the Society for 1931, pp. 243–248.

Dr. Scott received the apppointment and he entered upon his duties early in 1906. Mr. Root corroborates this account of Dr. Scott's appointment: "He came to the State Department without any influence or backing of any kind. I had never known him and nobody spoke for him. He was selected solely for what he had already done and from what I could learn from inquiries I made." [25]

Mr. Root was desirous of appointing a Solicitor competent to relieve him of the detailed legal work involved in passing upon claims of American citizens against foreign countries which were irritating some of our international relations. The first to receive his attention were five claims against Venezuela. Secretary Root, himself a distinguished lawyer, reviewed each case as it was presented to him by his new Solicitor and, as Dr. Scott said, reached his decisions "as a judge on the bench" and not as a politician. On one occasion Dr. Scott quotes Mr. Root as remarking: "We must always be careful, and especially so in our relations with the smaller states, that we never propose a settlement which we would not be willing to accept if the situation were reversed." [26] It can easily be imagined how a legal adviser with Dr. Scott's ideals of justice felt perfectly at ease with a chief whose official actions were guided by the same high standards of conduct. Secretary Root offered to arbitrate the five claims against Venezuela but that Government eventually preferred to settle four of them through diplomatic channels and the fifth was submitted to the Permanent Court of Arbitration at The Hague, which rendered a decision in favor of the United States on October 25, 1910.[27] It was Secretary Root's policy to settle outstanding differences with Canada as well as those with the countries to the south. The most important of the former was the century-old North Atlantic coast fisheries dispute, which was referred for arbitration to The Hague in 1910. The Solicitor acted as counsel to the American agent.[28]

Other work of Dr. Scott in the Department of State is referred to elsewhere in this article. The esteem in which he was held by the Secretary of State is a matter of record. In writing to Dr. Nicholas Murray Butler about Dr. Scott's services Mr. Root said: "I consider it one of the most fortunate events of my administration of the State Department that I was

[25] Letter of Elihu Root to Nicholas Murray Butler, Dec. 18, 1909, quoted in the biography *Elihu Root*, by Philip C. Jessup, New York: Dodd, Mead & Co., 1938, Vol. I, p. 456.

[26] Dr. Scott's account of his appointment and of these incidents is contained in his address as President of the American Society of International Law, in Proceedings of the Society for 1937, pp. 6–8.

[27] For Dr. Scott's account of these cases and of the diplomatic negotiations which led to their settlement, see the AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 3 (1909), pp. 436, 985. The award of the Hague tribunal is printed, *ibid.*, Vol. 5 (1911), p. 230.

[28] For Dr. Scott's account of this case and comments upon it, see his editorials in the AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 1 (1907), p. 144, Vol. 3 (1909), p. 953, Vol. 4 (1910), p. 675, Vol. 5 (1911), p. 725, and Vol. 7 (1913), p. 140. For the award of the tribunal, see *ibid.*, Vol. 4 (1910), p. 948.

able to secure him for Solicitor." [29] The friendship between the two men lasted long beyond the tenure of their official positions in the Department. Mr. Root has himself informed us that when he was asked by Mr. Carnegie late in 1910 to accept the Presidency of the Endowment for International Peace, he did so "with the condition that Mr. Scott should be made the Secretary and the executive head." [30] Following his successful administration of the State Department, Mr. Root became United States Senator from New York, and served from 1909 until 1915. While he was in the Senate, Mr. Root had in Dr. Scott a ready and devoted aide whenever he wished information on international questions before that body.[31] The addresses and state papers of Mr. Root were later collected and edited by Dr. Scott jointly with Robert Bacon.[32] In 1920 Mr. Root asked Dr. Scott to accompany him to The Hague to assist in his work on the committee to prepare a plan for the Permanent Court of International Justice.[33] When Mr. Root was a delegate of the United States at the Conference of Washington in 1921–1922 on Limitation of Armament and Pacific Questions, Dr. Scott was an adviser to the American delegation. Mr. Root remained President of the Endowment until 1925 when he retired and was succeeded by Dr. Nicholas Murray Butler, who had encouraged Mr. Carnegie to found the Peace Endowment. Dr. Scott as the Secretary and a Director of the Endowment was thus for many years closely associated with both Mr. Root and Dr. Butler in important official work and in non-official activities of a semi-public nature.

THE CLASSICS OF INTERNATIONAL LAW

Although an enthusiastic believer in the casebook method of teaching law in the class room, including international law, as Solicitor for the Department of State Dr. Scott was confronted at once with the need of access to wider sources of the law. In confessing this need he admitted that "it is impossible for students of international law in our various colleges and universities to trace the history of international law to its sources." Scholar that he was, Dr. Scott was unable to accept the popular reference to Grotius as the founder of international law. "He was not the founder nor was he the father of the science," but "the individual greatness of the work of Grotius

[29] Letter of Dec. 18, 1909, previously mentioned. See footnote 25.

[30] Remarks at the 21st anniversary meeting of the Endowment held at the home of Mrs. Carnegie in New York City, Dec. 14, 1935. Year Book of the Endowment, 1936, pp. 25–26.

[31] See, for example, the statement concerning Dr. Scott's aid in the preparation of Senator Root's argument in the Panama Tolls controversy. *Elihu Root*, by Philip C. Jessup, Vol. II, p. 266.

[32] Cambridge: Harvard University Press, 7 vols., 1916–1918. An eighth volume edited by Dr. Scott was published in 1924. In editing this series Dr. Scott had the assistance of Mr. S. N. D. North, former Director of the Census, then associated with the Endowment. Mr. Bacon having died in 1919, Dr. Scott wrote his biography. *Robert Bacon, Life and Letters*, Garden City, N. Y.: Doubleday, Page & Co., 1923.

[33] See, *infra*, section on An International Court of Justice, p. 200.

consists in the fact that he built upon the past with full knowledge of the writings of antiquity and of the Middle Ages. . . . By treating the subject from a general as well as from a particular standpoint he laid the foundations of international law." Historically speaking, Dr. Scott divided international law writers into three great groups: first, the predecessors of Grotius, second Grotius, and third, the successors of Grotius. Grotius was, therefore, the middle point in the development of international law.

To make available in this country the necessary materials for the scientific and historical study of the sources of international law, Dr. Scott in the summer of 1906 approached the President of the Carnegie Institution of Washington (the Carnegie Endowment was not established until five years later) with the view of interesting him in the republication of what Dr. Scott called the *Corpus Juris Gentium* by analogy to the *Corpus Juris Civilis* and the *Corpus Juris Canonici*. President Woodward encouraged Dr. Scott to submit his proposal in writing, which he did in a letter of November 2, 1906.[34] After outlining his proposal, Dr. Scott offered to assume general supervision of the series but upon condition that his services should be gratuitous, ending his letter as usual with an apt quotation, this time from Lord Bacon: "I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves by way of amends to be a help and ornament thereunto." The letter was convincing, for the Carnegie Institution undertook to publish the series under the title "Classics of International Law" and appointed Dr. Scott General Editor. He began the unique task by consulting European and American publicists as to the usefulness of the plan. He obtained their endorsement, their advice as to the works to be included, and pledges of their personal coöperation. He therefore was able to state in his preface to the first volume, which was published in 1911, that "the undertaking is international in scope, in selection, and in execution." "The underlying principle of selection," he explained, "has been to reissue those works which can be said to have contributed either to the origin or to the growth of International Law, and the term classic has been used in the broad rather than in the narrow sense, so that no work will be omitted which can be said to have contributed to the origin or growth of the Law of Nations." Concerning the plan of publication the General Editor further explained: "The text of each author will be reproduced photographically, so as to lay the source before the reader without the mistakes which might creep into a newly printed text. In the case of the early authors the photographed text will be accompanied by a revised text whenever that course shall seem desirable." Biographical details and the place of the text in international law would be supplied in an introduction to be prefixed to each work and, where necessary, tables of errata and notes would be added to clear up ambiguities and correct mistakes in the texts supplied. Finally, each work was to be accompanied

[34] Printed by the Carnegie Institution of Washington, January, 1907.

by an English version made especially for the series by a competent translator.

Within less than five years from his appointment as General Editor, Dr. Scott had located in various libraries of the world the original Latin texts which were selected for republication, had enlisted the collaboration of outstanding authorities in international law to prepare introductions to them, and had engaged the most competent scholars to prepare the English versions. By the year 1911, the volumes began to roll from the press and up to the time the United States entered the war in 1917 treatises by the following authors were published under the imprint of the Carnegie Institution of Washington: **Zouche** (1650), Ayala (1582), Grotius (1646), Vattel (1758), Rachel (1676), Textor (1680), Victoria (1696), and Legnano (1477). At that time Dr. Scott was recommending to the Trustees of the Carnegie Endowment for International Peace that the Division of International Law of the Endowment, of which he was then Director, take over the financial responsibility for the future of the series. In making this recommendation he justified the continuance of the series in view of the war as follows:

> International law as a system will survive the calamitous and brutal war of 1914, but it will be shattered in the conflict and many of its provisions will be bruised, if not destroyed. The general public appears to regard international law as a modern invention, and looks to the Hague conventions as the source of its authority. It is especially important at this juncture that the general public should know and that the professors and students of international law should be in a position to make it clear that international law is not a thing of convention, and of compromise, to be found in treatises of recent date, but that it is the slow and painful outgrowth of centuries in response to the needs of nations and of peoples, which however distant in space and in thought, must have dealings one with the other, and must have those dealings conformed to law if justice and its perfected fruit, peace, is ever to prevail between nations as it does and as all recognize that it must between the men and women composing them. Desirable in 1906, the series is necessary in 1917, and it is the intention and the earnest hope of the Director of the Division and General Editor of the series, that treatise after treatise and volume after volume may appear in rapid succession during the continuance of the war, and after its close, so that those principles of international law which have come into being in response to the needs of the nations will not only be known of the nations, but also, by creating an international opinion in behalf of international law, will persuade where force can not compel the nations to accept its just principles and to dwell in peace.[35]

Again Dr. Scott was successful, for the Trustees of the Endowment approved his recommendation and future numbers of the Classics of International Law appeared over the Endowment's imprint. But the General Editor was disappointed in his hope that "treatise after treatise and volume after volume" would "appear in rapid succession during the continuance

[35] Annual Report, March 21, 1917, Carnegie Endowment Year Book, 1917, p. 106.

of the war." The next number did not appear until two years after the Treaty of Peace was signed. The subsequent treatises published by the Endowment were three by Gentili (1594, 1612, 1661), three by Pufendorf (1672, 1682, 1688), two by Bynkershoek (1737, 1744), one by Wolff (1764), one by Belli (1563), one by Wheaton (1866), and selections from three works of Suárez (1612, 1613, 1621). The General Editor contributed his own treatise entitled *The Spanish Origin of International Law.*

Each number embraces from one to three volumes and the twenty-two titles in the series contain thirty-eight volumes in all.[36]

The General Editor went to considerable trouble in locating the best portrait available of each classical author to be reproduced as a frontispiece of his work. This fancy for embellishment had an unexpected sequel which gave Dr. Scott the greatest pleasure and has produced a lasting but somewhat unsuspected memorial to his achievements in the field of jurisprudence. When the new building for the Department of Justice was completed in Washington, it was decided to adorn the ceremonial entrance leading from the court of honor with a series of mural panels depicting the great law givers of history. Beginning with Menes, a king of ancient Egypt, the panels show the figures of successive epochs as they pass through the ages to the present generation. Unable to locate a likeness from which to paint the features of Victoria, one of the Spanish predecessors of Grotius, for inclusion in the murals, the artist, hearing of Dr. Scott's work, sought his advice on a portrait of his subject. Unfortunately, Dr. Scott had to tell him that none could be found anywhere in the world. The artist returned to his mural and painted the figure of Victoria garbed true to life as a Dominican friar but with an excellent likeness of the head and hands of James Brown Scott.[37] So there in the halls of justice at Washington, standing among the great law givers of the world opposite Hugo Grotius, is a good portrait of Dr. Scott disguised in the habit of the Dominican theologian who expounded the law of nations one hundred years before the classic treatise of Grotius. Made available to modern scholarship by Dr. Scott and the Carnegie Institution, the work of Victoria has belatedly earned for him a place among the world's great jurists and official recognition as "the professor of Salamanca who, in the sixteenth century, established the foundations of modern international law." [38] Thus, "Poetic Justice, with her lifted scale, in nice balance truth with gold she weighs."

[36] The full list of authors and titles published in the Classics of International Law, giving complete bibliographical data in regard to each number, is included in the List of Publications of the Carnegie Endowment for International Peace, printed separately, and in the Year Books of the Endowment up to 1941.

[37] For reproductions of these murals, see the *American Bar Association Journal*, Vol. 23 (1937), p. 928, and Vol. 24 (1938), p. 10.

[38] Resolution of the 7th International Conference of American States, Montevideo, Dec. 23, 1933, recommending that a bust of Victoria be placed in the Pan American Union at Washington.

AN INTERNATIONAL COURT OF JUSTICE

From its influence upon his future career, probably the most important event in his term of office as Solicitor for the Department of State was Dr. Scott's designation as a technical delegate and expert in international law on the American Delegation to the Second Peace Conference at The Hague in 1907. Long before his appointment to this position, he had taken an interest in international arbitration. While residing at Los Angeles he delivered in the year 1897 before the Sunset Club of that city an address in which he reviewed the history of international arbitration and proposed the establishment of a permanent international tribunal.[39] Secretary Root's instructions to the American Delegation to the Second Hague Conference of 1907 sought to improve the organization of the Permanent Court of Arbitration established by the First Hague Conference of 1899, which was but a panel of judges from which *ad hoc* tribunals might be constituted. Mr. Root desired to transform the Court of Arbitration into "a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility."[40] The Solicitor undoubtedly had some hand in drafting these instructions of the Secretary of State. Owing to irreconcilable differences between the large and small states over the appointment of the judges, the conference did not take definitive action upon the American Delegation's project but recommended the adoption of a draft convention for the organization of a Court of Arbitral Justice and its establishment as soon as agreement could be reached respecting the selection of the judges.

After returning from the Hague Conference, Dr. Scott made it his special concern to keep the international court project alive through diplomatic channels. A year later an International Naval Conference was held at London to attempt to agree upon a code of law to be applied by the International Prize Court recommended by the Hague Conference of 1907. Dr. Scott proposed that this court be invested with the jurisdiction and functions of the Court of Arbitral Justice. Robert Bacon, who had succeeded Mr. Root as Secretary of State, sent instructions to this effect on February 6, 1909, but the Naval Conference considered the proposal beyond its scope. A month later, Philander C. Knox became Secretary of State, but Dr. Scott remained as Solicitor and took every opportunity to instill in his new superior his own enthusiasm for an international court. In this effort Dr. Scott was completely successful, for on October 18, 1909, Secretary of State Knox formally proposed through diplomatic channels an agreement to invest the judges of the proposed International Prize Court, then still under

[39] Mss. in Dr. Scott's files.

[40] Instructions to American Delegates to the Hague Peace Conferences and Their Official Reports. Carnegie Endowment for International Peace, 1916, pp. 79–80.

official consideration, with competence to sit as judges of the Court of Arbitral Justice. While the replies to this proposal were not favorable to investing the Prize Court with additional jurisdiction, they did indicate a willingness to establish the Court of Arbitral Justice as a separate institution by employing the same method of composition as that of the Prize Court. Dr. Scott was accordingly appointed to a commission with representatives of France, Germany and Great Britain which met at Paris in March, 1910, and drafted a convention to establish the Court of Arbitral Justice as soon as eighteen powers ratified it. The necessary ratifications were not, however, obtained; so in 1912 Dr. Scott, although no longer an official of the State Department, prepared another draft convention for the establishment of the Court of Arbitral Justice by nine powers, namely, Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, The Netherlands, and Russia. Secretary Knox approved the new draft and again requested Dr. Scott to undertake a mission to the European powers and endeavor to put the proposal into effect. His official instructions were actually signed on November 25, 1912, but for reasons which Dr. Scott later stated in no way reflected upon the project, it was finally deemed best not to open the negotiations at that time.[41]

To create public opinion in the United States in favor of the Court of Arbitral Justice, Dr. Scott in February, 1910, joined with Mr. Theodore Marburg, of Baltimore, former United States Minister to Belgium, in organizing the American Society for the Judicial Settlement of International Disputes, of which Dr. Scott was President for the first year. The Society held annual meetings and published quarterly pamphlets. For several years Dr. Scott obtained financial assistance from the Carnegie Endowment to publish and distribute the proceedings of the meetings. Prominent members of the Society later became attracted to what they considered the more practical plan of the League to Enforce Peace, and the Society for Judicial Settlement went out of existence after the United States entered the World War in 1917. Dr. Scott declined to follow his fellow members in the program of the League to Enforce Peace. His reasons were stated in a letter to Mr. Marburg: "I doubt if you will ever be able to convince the United States that it would be proper to allow, by formal treaty, a combination of foreign powers to use force against it, and I do not see how we are justified, citizens as we are of the most progressive power, to advance proposals such as the League of Peace, which we know would not, indeed could not, be accepted by our country." [42]

[41] See the following books by Dr. Scott published by the Carnegie Endowment in 1916: *An International Court of Justice* and *The Status of an International Court of Justice.* A French edition in one volume was published in 1918 under the title *Une cour de justice internationale.*

[42] Letter dated Feb. 15, 1915, printed in Marburg, *Development of the League of Nations Idea*, New York: Macmillan Co., 1932, Vol. I, p. 23.

Sixteen years later in an address narrating the progress of international law during the preceding quarter of a century, the influence of the moral philosophy of the Spanish theologians which had profoundly impressed Dr. Scott while editing the Classics of International Law, became evident in his changed attitude. "They," he said, "conceived of states made up of individuals, with governments of their own but changeable at will, and forming by mere association a family of nations." "This larger family," he continued, "possesses the inherent right of protecting itself, of issuing edicts, of securing their enforcement and of punishing violations of the law of nations." Thus "little by little the germ, like the grain of mustard seed, has grown until the nations of the world can rest themselves under its ample branches, and we find ourselves living under the Covenant of the League of Nations." "The Covenant means," he declared, "that no calamity can happen to one country without affecting in a greater or less degree each and every other country. . . . No violation of international law in any part of the world is a matter of indifference to any and all other nations, because if one state has the right to violate a principle of the law of nations, every other state has the same right, with a resultant anarchy. . . ."[43]

His resignation from official position as Solicitor for the State Department to accept private employment with the Carnegie Endowment for International Peace did not affect his determination to leave no stone unturned to bring about the creation of an International Court of Justice. While at The Hague on January 12, 1914, on business of the Endowment, Dr. Scott sent a letter to the Minister of Foreign Affairs of The Netherlands proposing that his Government take the initiative to constitute the Court of Arbitral Justice by the nine powers previously mentioned; but the outbreak of the World War within six months put an end to this effort. Five years later as Legal Adviser to the American Commission to Negotiate Peace at Paris, Dr. Scott urged through all the channels available to him the inclusion in the Covenant of the League of Nations of provision for the establishment of a Permanent Court of International Justice. This was done in Article 14 of the Covenant.

The difficulty of electing the judges which stood in the way of creating the Court led Dr. Scott to examine the experience of the thirteen American colonies which succeeded in establishing a Supreme Court to decide all cases between the States of the American Union. Under his direction, the Division of International Law of the Endowment published two volumes of cases between States decided by the United States Supreme Court, to which he wrote a companion volume containing an analysis of the cases and pointing out the Court's procedure.[44] Before the end of World War I, he

[43] Proceedings of American Society of International Law, 1931, p. 6.

[44] *Judicial Settlement of Controversies between States of the American Union* (New York: Oxford University Press, 1918), and *Analysis, id.*, same imprint, 1919. See also his volume in French *L'Evolution d'une Juridiction Internationale Permanent*, Paris: A. Pedone, 1919.

jointly edited with Gaillard Hunt what was called an international edition of the *Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America, as reported by James Madison.*[45] In his introduction, Dr. Scott asserted that the Federal Convention was in reality an international convention of the thirteen sovereign colonies which had obtained their independence from the mother country. A study under the title *The United States of America: A Study in International Organization,*[46] was simultaneously prepared by him "in the belief that the experience of the American States would be of value in any attempt to strengthen that larger Union of States which we call the Society of Nations." The introductions to both of these volumes were dated November 11, 1918, the day of the Armistice, and advance proofs were taken by Dr. Scott to Paris when he accompanied the American Commission to Negotiate Peace. Copies of the volumes were also taken by Dr. Scott on his voyage with Mr. Root to The Hague in the summer of 1920 to attend the meeting of the Advisory Committee of Jurists which drafted the Statute of the Permanent Court of International Justice. Dr. Scott took advantage of this voyage to discuss with Mr. Root the method adopted by the American colonies in solving the conflicting views on representation of the great and small states by the establishment of two Houses of Congress in one of which they would be represented on the basis of population and in the other on the basis of equality. These conversations bore good fruit. With his usual skill, Mr. Root proposed that the Advisory Committee of Jurists take advantage of the existence of the Council and Assembly of the League of Nations, the former dominated by the large powers and the latter controlled by the small states, to vote separately on candidates for election to the proposed Court in the same way that the two Houses of the United States Congress vote separately on legislation before them, and that, following further the American procedure, in cases of disagreement a conference committee be appointed by both bodies to adjust the difference.[47] The acceptance of Mr. Root's proposal by the Advisory Committee solved the difficult problem of electing the judges and made it possible to agree upon the constitution of the Court. The protocol to establish the Permanent Court of International Justice was signed at Geneva on December 16, 1920, and went into effect on August 20, 1921. After a preliminary meeting at The Hague on January 30, 1922, the Court was formally opened on February 15 of that year in the Peace Palace, which had been previously built in that city through the munificence of Mr. Carnegie as the home of the Permanent Court of Arbitration. Thus again Dr. Scott witnessed the realization of a project to promote international justice which he had long advocated and for which he had worked assiduously for

[45] New York: Oxford University Press, 1920. [46] Same imprint and date.

[47] See speech of Mr. Root in the Advisory Committee of Jurists, June 18, 1920, reprinted in AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 15 (1921), pp. 2–3, and *Elihu Root*, by Philip C. Jessup, Vol. II, p. 420.

many years. The Court continued to function until 1940 when its doors were closed to the further administration of justice between nations by the *force majeure* of a hostile invader. *Inter arma silent leges.*

THE HAGUE ACADEMY OF INTERNATIONAL LAW

While attending the Second Peace Conference at The Hague in 1907, Dr. Scott heard the President of the Conference, M. Nelidow, call the attention of the delegates to two communications he had received on the subject of an academy of international law at The Hague. At the third plenary session of the Conference held on July 20, the President mentioned a special communication from Mr. Richard Fleischer, editor of the *Deutsche Revue*, who sent a copy of the preceding number of that review containing an article by Professor Otfried Nippold, of Berne, recommending that the Conference create such an academy alongside the Court of Arbitration. M. Nelidow expressed great sympathy with the proposal. Such an institution, he said, would be "somewhat like the 'Asclepion' which Hippocrates founded on the island of Cos for the study of medicine," and he hoped that some generous benefactor, following the example of Mr. Carnegie, might "immortalize his name by connecting it with an establishment which will do great service to the cause of peace and of international justice by contributing to the spread of its principles and to the instruction of worthy laborers in that field." M. Nelidow reverted to the subject again at the fifth plenary session on September 7 when he read to the Conference a letter from the Prime Minister of Rumania, M. Demetrios Sturdsa, submitting a project for the creation of an academy of international law at The Hague. M. Sturdsa proposed that such an institution act as a scientific bond between the Court of Arbitration and the Conference, and that its practical execution be entrusted to the Permanent Administrative Council established in 1899. Both proposals were deposited in the archives of the Conference and made a part of its official records.[48]

Little did Dr. Scott, at that time an interested listener, for he had an exceptionally good understanding of French in which the proceedings of the Conference were conducted, dream that within a few years he would be in a position to promote the realization of this project from funds to be provided by Mr. Andrew Carnegie. Upon his appointment as Director of the Division of International Law of the Carnegie Endowment for International Peace early in the year 1911, he requested the advice of the international lawyers throughout the world upon the work that might be usefully undertaken by the Endowment in the field of international law. One of the responses to this letter was a communication dated October 11, 1911, from Mr. T. M. C. Asser, Minister of State of The Netherlands, containing a memorandum and statutes drawn up by a Dutch committee of statesmen and professors for the establishment of an academy of international law at

[48] Carnegie Endowment Year Book, 1911, pp. 109–110.

The Hague following the suggestions which had been made to the Peace Conference four years before. Dr. Scott communicated this project to the Trustees of the Endowment with his first annual report. It was approved by them in principle subject to the working out of detailed plans of organization and operation.

In the next two years Dr. Scott conferred with authorities on international law in America and Europe, including the *Institut de Droit International* and the International Law Association, both of which passed resolutions favoring the academy and offered suggestions concerning its constitution and program. He also conferred with the Dutch Minister of Foreign Affairs, with the President of the Dutch Commission on the Peace Palace, and with Mr. Asser, Chairman of the Dutch Committee. It was generally agreed that the proposed institution at The Hague should not compete with colleges and universities already established, and accordingly it was provided that the sessions of the academy should be held in the summer during the vacation periods of other academic institutions. Assurance was obtained through the Dutch Government of the coöperation of a number of other governments by sending younger members of their diplomatic, consular, and other foreign services to take the courses at the academy. The proposal was finally approved by the Trustees of the Carnegie Endowment late in 1913 and an appropriation provided to finance the greater part of the expenses involved. The constitution of the Academy was agreed upon at The Hague on January 12, 1914, where it was incorporated on the 27th day of that month. It was to be formally opened on October 1 of that year, but in Dr. Scott's words, "The events of the latter part of July and of the first week of August rendered inevitable the postponement of the opening of the Academy, whose labors it was hoped would tend to prevent recourse to arms, which has plunged the most enlightened nations of Europe into a cruel, devastating and unspeakable war." [49] The President of the Council of Administration of the Academy, Mr. Van Karnebeek, former Minister of Foreign Affairs of Holland, on August 13, 1914, notified the members of the Curatorium, by which name its governing body was known, that the inauguration would have to be postponed until "international relations have again become normal."

The four years of the first World War plus five years of confused governmental efforts intervened before international relations were again sufficiently normal for the Academy to open. This event, however, took place on July 14, 1923, and the courses actually began two days later. For seventeen years thereafter the Academy met uninterruptedly during the summer months at The Hague. From the point of view of the standing of the professors, the quality of their lectures, and the number and interest of the students it was an unqualified success and the hopes of its founders were realized beyond all expectations. Besides the actual classroom work, the Academy served a four-fold purpose: (1) an annual conference of professors of inter-

[49] Annual Report, March 17, 1915, Year Book for 1915, p. 132.

national law of many nationalities; (2) a meeting of students from many countries, who at once organized an association through which they sought to keep in contact after they returned to their homes; (3) a mingling of students and professors in extracurricula activities, social as well as educational; (4) the publication and distribution of the lectures to libraries and readers throughout the world. Published in a series known as the *Recueil des Cours de l'Académie de Droit International de La Haye*, these lectures number sixty-six imposing volumes and constitute a veritable mine of information and scientific opinion. During the seventeen years of its operation, there was a total attendance of over 6,000 students representing 62 different nationalities. The lecturers numbered over 200 and were from 38 different countries. In all they gave 412 courses.

As in the summer of 1914 World War I delayed the opening of the Academy for nine years, so in the summer of 1939 World War II closed the doors of the Academy for no man knows how long. Its last session ended on August 25, 1939, hardly more than a week before the outbreak of the present war.

INSTITUTES OF INTERNATIONAL LAW [50]

In 1908 Dr. Scott was made an Associate of the *Institut de Droit International* and a full member two years later. The *Institut* was founded at Ghent in 1873 and has met ever since at irregular intervals in the principal cities of Europe. Its accomplishments have aided materially in the development of international law.[51] Membership in the *Institut* is restricted and election to it is properly regarded as a highly prized recognition of distinction. Soon after the beginning of his duties with the Carnegie Endowment, Dr. Scott conferred with members of the *Institut* concerning the program of the Division of International Law and later made an arrangement whereby the *Institut* would act as adviser to the Division. A Consultative Committee was appointed by the *Institut* for this purpose. This relationship was continued for several years and in appreciation of this service the Endowment made contributions toward the expenses of the *Institut's* meetings. In 1925, Dr. Scott was elected its President and served until 1929.

His membership in the *Institut de Droit International*, which met only in Europe, started Dr. Scott thinking of an American Institute which might render services in the Western Hemisphere comparable to those of the European prototype. The success of the American Society of International Law in arousing interest in and spreading knowledge of international law in the United States also created a desire in Dr. Scott's mind to extend the influence of institutions of this character beyond the confines of his own country. Coupled with these ideas was a genuine belief that closer co-

[50] See article "The Two Institutes of International Law," by Dr. Scott in AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 26 (1932), p. 87.

[51] See *Resolutions of the Institute of International Law*, published by the Carnegie Endowment, 1916; French edition published in 1920.

operation between the Anglo-Saxon countries and the Latin nations of America would be highly effective in the development of international law. How these ideas developed along constructive lines may again be told in Dr. Scott's own words:

> In June, 1911, Mr. Alejandro Alvarez, legal adviser to the Ministry of Foreign Affairs of Chile and member of the Permanent Court of Arbitration, and the Director of the Division of International Law considered the advantages and feasibility of establishing an American Institute of International Law, which should be a private association, composed of five publicists from each of the states of the American continent. It was felt that this would be a common meeting-ground for American publicists to discuss and decide practical problems, especially American problems, according to the principles of international law; that the exchange of views would be a benefit in itself; and that the personal friendships formed at the meetings of such an Institute would go far to remove the distrust with which Latin American publicists regard the motives of certain states, especially our own.[52]

He also informs us that:

> The purpose of the founders was not to create one more international society, although it might have been wise so to do. They believed that in democratic countries a knowledge of international law is essential, in order that the people may see to it that a foreign policy be adopted in strict accord with the duties as well as the rights of their countries, under the law of nations. The proposers felt that diffusion of correct and enlightened principles of international law could best, and indeed could only, be done by the peoples of the different countries, and that the purpose in mind could be most easily accomplished by the creation of national societies of international law, which could be affiliated with the Institute.[53]

It was therefore decided that the five publicists from each of the American Republics who would form the membership of the American Institute should be recommended by a society of international law organized in each of the American Republics.

The plan was communicated to members of the *Institut* in Europe and to leading American publicists and received their hearty approval. The project was officially approved by a resolution adopted July 16, 1912, by the Commission of American Jurists then meeting at Rio de Janeiro, and by the Governing Board of the Pan American Union in a resolution adopted December 1, 1915. Advantage was taken of the meeting in Washington of the Second Pan American Scientific Congress in December, 1915, formally to inaugurate the American Institute of International Law on the 25th of that month. Dr. Scott was able to report that a national society of international law had been formed in each of the American Republics and that all were represented at this first meeting of the Institute. Before the meeting

[52] Carnegie Endowment Year Book, 1912, p. 127.

[53] *Ibid.*, 1915, p. 118.

adjourned, the Institute adopted as the foundation of its future work a "Declaration of the Rights and Duties of Nations," which reads as follows:

> I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.
>
> II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.
>
> III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them."
>
> IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.
>
> V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.
>
> VI. International law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations and applicable as such to all questions between and among the members of the society of nations involving its principles.[54]

The wording of this Declaration, and of an Official Commentary which accompanied its adoption, bear inherent evidence that Dr. Scott was the principal draftsman.

The second session of the Institute was held at Habana, Cuba, in January, 1917, upon the official invitation of the Government of Cuba. The President of the Republic presided at the opening session, and the Cuban Congress made an appropriation for the entertainment of the delegates. The Government of Uruguay officially invited the Institute to hold its third session in Montevideo. This invitation was accepted but the intervention of World War I delayed the meeting at Montevideo until 1927. The Institute met again at Lima, Peru, in connection with the Third Pan American Scientific Congress in 1924; and the last meeting was held in the same city in 1938 where its importance was recognized by being placed upon the official program of events held in connection with the Eighth International Conference of American States. The Institute has to its credit recommendations con-

[54] *The American Institute of International Law: Its Declaration of the Rights and Duties of Nations.* By James Brown Scott. President. Washington, 1916. Also French edition, same date.

cerning international organization [55] and a number of draft codifications of various subjects of international law upon which general agreement is desirable,[56] some of which have already been adopted in conventions of the American Republics.

EQUAL RIGHTS FOR WOMEN

The eldest of Dr. Scott's three older sisters, Mary Scott, who died recently after passing her ninetieth birthday, decided to make medicine a career and became a successful physician. At the time she wished to study, however, the place of women in the medical world was considered not higher than that of midwife.[57] The difficulties encountered by his sister in obtaining an education in a profession then regarded as the exclusive possession of men were deeply resented by and made a lasting impression upon the mind of her young brother James. Later when the women's suffrage movement developed into an active political issue, Dr. Scott did not need to be converted to the cause. Although he never engaged in politics, he was proud to support the Nineteenth Amendment to the Constitution of the United States which conferred the right of suffrage upon women in 1920.

One of his first duties as Solicitor for the Department of State happened to be the consideration of the citizenship laws of the United States with special reference to expatriation and protection abroad. He was appointed chairman of a State Department committee to report on the subject under a joint resolution passed by Congress in April, 1906. Among the recommendations of the committee which he signed as Chairman was one that an American woman who marries a foreigner shall take the nationality of her husband.[58] This recommendation became Section 3 of the Expatriation Act approved March 2, 1907. In commenting upon the Act shortly after its adoption, Dr. Scott explained the reason for this provision in the following characteristic fashion: "It is a noticeable fact that American young women of beautiful parts and ample fortunes have insisted on conferring themselves and their purses upon impecunious foreigners. The union ordinarily ends by mutual separation or by the action of the divorce court. The young woman has experience, the foreigner has the purse. What is the status of this woman?" [59] Some twenty-five years later when reporting to the American Society of International Law on progress in that subject during the preceding quarter of a century, Dr. Scott expressed his pleasure that the provisions of the Expatriation Act of 1907 had ceased to be law because it was a "he" statute. The members of the committee which recommended the

[55] Carnegie Endowment Year Books, 1916, p. 129, 1917, pp. 166–169.

[56] Codification of International Law. Pan American Union, Washington, 1925.

[57] See biographical sketch by Doris Stevens in *Paintings and Drawings of Jeannette Scott*, privately printed by Dr. Scott in memory of another sister who was a successful artist.

[58] See Report on Citizenship of the United States, Expatriation, and Protection Abroad. H. Doc. No. 326, 59th Cong., 2nd Sess.

[59] Editorial comment, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 1 (1907), p. 459.

statute, he said, "have since discovered that the content of human kind has been extended by the discovery of a submerged one-half, and that the one-half in question has not been in favor of some of its dispositions, which may also be said of the erstwhile chairman of that body." [60]

As in the case of every other subject which came within his purview, Dr. Scott's views on the subject of the rights of women passed beyond the boundaries of the United States into the international sphere. When the National Woman's Party sent a committee to the Sixth International American Conference at Habana in 1928 to urge action in behalf of the civil and political rights of women pursuant to a recommendation of the Fifth Conference held at Santiago de Chile in 1923, they found at least one official American delegate to take a deep and sympathetic interest in their appeal. The Conference decided—with Delegate Scott no doubt working behind the scenes—to listen to them and later adopted a resolution constituting the Inter-American Commission of Women to report to the next Inter-American Conference. Thereafter Dr. Scott directed his talents and energy toward promoting the success of the work of that Commission. In March, 1933, the National Woman's Party had introduced in Congress a constitutional amendment under which men and women would have equal rights throughout the United States and giving Congress the power to enforce the amendment by appropriate legislation. Realizing the difficulties in the way of the adoption of such an amendment (it is still pending), Dr. Scott suggested a short-cut procedure to accomplish the same purpose by the treaty-making power. Arguing from the decision of the Supreme Court of the United States in the case of Missouri *v.* Holland,[61] relating to jurisdiction over migratory birds, he contended that if the United States became a party to a treaty conferring equal civil and political rights upon men and women, Congress would have the power to pass appropriate legislation to make the treaty effective throughout the United States regardless of any reserved rights of the States over which the Federal Congress without a treaty would have no jurisdiction.[62] A draft convention to this effect was submitted by the Inter-American Commission of Women at the Seventh International Conference of American States which met at Montevideo, Uruguay, in December, 1933. The proposal was not adopted by the conference in the form of a convention but instead a resolution was adopted recommending "to the Governments of the Republics of America that they endeavor, so far as the peculiar circumstances of each country will conveniently permit, to establish the maximum of equality between men and women in all matters pertaining to the possession, enjoyment and exercise of civil and political rights." [63]

[60] Proceedings of the Society for 1931, p. 29.

[61] 252 U. S. 416 (1920).

[62] Address before the Biennial Convention of the National Woman's Party, Wilmington, Del., Nov. 4, 1933, printed in *Equal Rights*, Nov. 18, 1933, p. 323.

[63] *International Conferences of American States, First Supplement.* Washington: Carnegie Endowment for International Peace, 1940, p. 37.

Another project recommended by the Inter-American Commission of Women was adopted by the Montevideo Conference in the form of a Convention on the Nationality of Women, which provides that "There shall be no distinction based on sex as regards nationality" in the legislation or practice of the contracting parties. This convention has been ratified by eleven states, including the United States, some with reservations.[64] The Inter-American Conference for the Maintenance of Peace, held at Buenos Aires in 1936, also received a report from the Inter-American Commission of Women and adopted a recommendation that the Governments of the American Republics "adopt the most adequate legislation granting to women full recognition of the rights and duties of citizenship." [65] The last of the Inter-American Conferences so far held, the eighth at Lima in 1938, adopted a declaration in favor of women's rights which included the right among others "to political treatment on the basis of equality with men." [66]

In the formulation of all these reports and in the drafting of its recommendations, the Inter-American Commission of Women had the encouragement, the advice and the support of Dr. Scott personally as well as through the American Institute of International Law of which he was President.

SERVICES FOR THE GOVERNMENT

Dr. Scott's resignation as Solicitor for the Department of State in order to accept his positions with the Carnegie Endowment for International Peace did not, as has already been stated, end his services to the United States Government, and the Trustees of the Carnegie Endowment were happy to lend them on a number of important occasions. Shortly after the outbreak of the European war in the summer of 1914, he was appointed Special Adviser to the Department of State in matters of international law arising out of that war. In November, 1914, a Neutrality Board was constituted of representatives of the State and Navy Departments, of which Dr. Scott was made the Chairman, with two high-ranking officers of the Navy as the other members. This Board met almost daily for over two years and prepared opinions and memoranda advising the Government on the numerous delicate and complex questions concerning the rights and duties of the United States as a neutral Power. The Neutrality Board continued to function until the United States entered the war on April 6, 1917, and thus changed its status from that of a neutral to a belligerent.[67] When it became apparent that the United States would enter the war, Dr. Scott obtained a commission as a reserve officer in the Judge Advocate General's Department of the United States Army and was called to active service as a Major on May 15, 1917. In this capacity he worked on the difficult problems connected with the first selective draft of

[64] *International Conferences of American States, First Supplement.* Washington: Carnegie Endowment for International Peace, 1940, p. 106. [65] *Ibid.*, p. 153. [66] *Ibid.*, p. 250.

[67] As the result of his service on the neutrality Board, Dr. Scott wrote a *Survey of International Relations between the United States and Germany.* New York: Oxford University Press, 1917.

men for the United States Army. As the end of the war came in sight, he was on February 3, 1918, detailed to the Department of State for the preparation of material on questions of international law preliminary to the Peace Conference. He served in this capacity until the American Commission to Negotiate Peace sailed with President Woodrow Wilson for Paris on December 4, 1918. Dr. Scott accompanied the Commission as legal adviser. Besides advising the American Delegation upon legal questions, he represented the United States on the Drafting Committee of the Conference, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, and the Committee on Submarine Cables.

As the United States representative on the *Comité de Redaction*, Dr. Scott took a deep interest in what he termed the "mêlée philologique" between the French and Anglo-Saxon heads of states and the Italian Minister of Foreign Affairs over the question of the official language of the conference. The contest resulted in a draw. French and English were used at will in the Conference and the *procès-verbaux* were written in the two languages. In the Treaty of Versailles with Germany and in the Covenant of the League of Nations, English and French were both used and made authentic on equal terms. In the other peace treaties English, French and Italian were used, the French to prevail in case of a divergence. Dr. Scott was an outspoken partisan of French as the language of diplomacy. A few years after returning from the conference at Paris, he wrote and published a monograph entitled *Le Français: Langue Diplomatique Moderne*,[68] in which he maintained that the views of the Anglo-Saxon bloc at Paris were based on a misconception of and were in opposition to international practice during the two preceding centuries. His sympathy, admiration and affection for France led him shortly thereafter to take part in the founding of the *Institut Français de Washington* to promote in the United States the study of French civilization and history, literature and art, and to preserve the memory of French contributions to the development of American civilization. The *Institut* has published a series of historical studies and documents relating to Franco-American relations, particularly with regard to the war for American independence. Dr. Scott was President of the *Institut* for about ten years and wrote one of its volumes entitled *De Grasse à Yorktown*.[69]

TRIP TO GERMANY IN 1928

Early in 1928, invitations were received by Dr. Scott to lecture at several German universities. Because of the nationalistic feeling in Germany against the "Versailles diktat," he had some misgiving as to accepting them. After consultation with President Butler, it was decided that Dr. Scott should go to Germany and President Butler appointed him Visiting Carnegie

[68] Paris: A. Pedone, 1924. On pp. 5–15 of this volume, the author gives a detailed account of the discussion at Paris above referred to.

[69] Paris: Les Editions Internationales, 1931.

Professor of International Relations. In informing the rectors of the German universities and the German Ambassador at Washington of Dr. Scott's visit, Dr. Butler said that "its purpose is to multiply and strengthen bonds of intellectual and scholarly understanding and friendship between Germany and the United States." Dr. Scott undertook this assignment in the summer of 1928 and delivered lectures at the universities of Kiel, Berlin, Munich, Heidelberg, Goettingen and Frankfurt. He was received with great respect, ceremony and courtesy and lectured before large and appreciative audiences, except at Heidelberg from which he had earned the degree of J.U.D. in 1894. When he arrived at this Alma Mater, he was waited upon by a committee of the faculty who wished him to make or consent to the making of a statement before his lecture that he had changed his mind about Germany's responsibility for World War I as contained in the Treaty of Versailles and in the report on responsibility for the war which Dr. Scott had signed at Paris in 1919.[70] The interview lasted for over three hours during which time the great hall of the university was filled to overflowing with students anxiously awaiting the lecture. Dr. Scott maintained the position that since his report at Paris was made in his capacity as an official representative of the United States Government, he was not at liberty to make any retraction and that he had not come to the university to discuss political questions. The committee insisted upon a retraction as a condition of the lecture, and accordingly Dr. Scott refused to go on. He left Heidelberg the next day and finished his lecture tour at Goettingen and Frankfurt without further incidents of this kind. His lecture at Goettingen was delivered on June 28, the anniversary of the signing of the Treaty of Versailles, a day looked upon as one of mourning in Germany. Nevertheless, Dr. Scott reported that he was received most graciously and the university insisted upon making the occasion a gala one.

LATER OFFICIAL SERVICES

When President Harding convened the Conference at Washington in 1921 on the Limitation of Armament and Pacific Questions, Dr. Scott was again called upon to serve as technical adviser to the delegation of the United States. In 1924 he represented the United States as an official delegate to the Third Pan American Scientific Congress at Lima, as he had done at the Second of these Conferences held at Washington in 1915–1916. In 1927 he again officially represented the United States, on this occasion at the meeting of the Inter-American Commission of Jurists held at Rio de Janeiro, to consider the codification of a number of questions of public and private international law. In the following year he was a delegate of the United States

[70] Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, with Memorandum of Reservations signed by Robert Lansing and James Brown Scott. AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 14 (1920), pp. 95 and 127.

to the Sixth International American Conference at Habana, Cuba. Two years later he was Chairman of the American Delegation to the Congress of Rectors, Deans and Educators held in the same city. In 1931 he was a delegate to the Fourth Pan American Commercial Conference at Washington. He was a member of the Commission between the United States and Norway under the Treaty of 1928 for the Advancement of Peace and was appointed to seven similar commissions by foreign governments. His last official assignment was in 1940 as delegate of the United States to the Eighth American Scientific Congress at Washington, where he was Chairman of its Section of International Law, Public Law, and Jurisprudence.

CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

When Mr. Andrew Carnegie in the fall of 1910 selected Trustees to administer his Endowment for International Peace, Dr. Scott was one of them. At Mr. Carnegie's invitation, the Trustees met in Washington on December 14, 1910, and received from him in person his gift of $10,000,000 "the revenue of which," he said, "is to be administered by you to hasten the abolition of international war, the foulest blot upon our civilization." In accordance with the previous understanding between Mr. Root and Mr. Carnegie,[71] Dr. Scott was immediately elected temporary Secretary, and when the permanent organization of the Endowment was effected on March 9, 1911, he was made permanent Secretary, which office under the By-Laws adopted made him the chief administrative officer of the Endowment. He thereupon resigned from the Department of State and remained throughout the balance of his life with the Carnegie Endowment. A few months after his appointment as Secretary of the Endowment, he was made Director of its Division of International Law to which was specifically assigned the development of international law as one of the particular objects specified in the Endowment's charter.

The more outstanding of Dr. Scott's activities as Director of the Division are referred to elsewhere in this article. A complete statement of them would be impossible within the scope of less than a volume, which the writer hopes later to prepare. For present purposes it will suffice to refer to Dr. Scott's annual reports to the Trustees of the Carnegie Endowment rendered over a period of some thirty years, which contain detailed accounts of the many projects he initiated and work with which he was associated. The annual reports are readily available in the Year Books of the Endowment. Besides his success in advocating the establishment of a Permanent Court of International Justice and of the Academy of International Law at The Hague, in founding the American Institute of International Law and in republishing the Classics of International Law, Dr. Scott was instrumental in having the Endowment through its Division of International Law contribute financially to societies, institutes, and journals of international law in order to

[71] See *supra*, p. 196.

encourage their work and extend their usefulness. The Division also undertook the preparation and publication of a series of volumes containing basic materials dealing with international arbitration, arbitral and judicial decisions, international conferences, treaties and texts including diplomatic correspondence not otherwise available, and with many special topics of international law not covered in the existing literature. Most of these materials were not easily accessible and could not have been made available through ordinary publishing channels because of their non-commercial character. For the same reason, the Division, under Dr. Scott's direction, granted financial assistance to enable authors to have published meritorious works which could not otherwise have been published, as a legitimate part of the Endowment's object to spread knowledge and education in this field. The study and teaching of international law became a special project immediately upon the assumption of Dr. Scott's duties as Director of the Division. After a survey to ascertain the status of this subject in American institutions of learning, several steps were taken to improve the methods of teaching and to increase interest in its study. Among these steps the most notable was the granting for many years of fellowships in international law by means of which opportunities were afforded for the training of competent teachers. A goodly number of professors later appointed to these positions came to them through the Endowment's fellowships.

In a report of a survey conducted for the American Council of Learned Societies about fifteen years ago, the work of the Division of International Law was examined and the following conclusion reached:

> No comment is required to make the fact stand out that few if any other branches of learning are in so favored a position as international law, so far as dependable financial support is concerned. . . . The Division of International Law . . . has come to be looked to by students of international law throughout the world as their principal resource in time of need. In addition to serving as a general clearing house, it contributes to the advancement of international law studies in many ways.[72]

Mr. Carnegie, the founder of the Endowment which bears his name, was personally interested in the development of international law and especially of international tribunals as a means of preserving peace and avoiding war; his Trustees specified in the charter of the Endowment that one of its particular objects should be the development of international law and they created a Division of International Law and made annual appropriations to promote work toward that object. Dr. Scott was appointed Director of this Division because of his known great knowledge of international law, of his ability to expound it both by word of mouth and by his pen, and because of his enthusiasm, constancy, and energy in working for his ideals.

[72] *Research in the Humanistic and Social Sciences*, by Frederic Austin Ogg. New York and London: The Century Co., 1928, p. 345.

Some of the conclusions to which he had come as a result of his years of thought and work were summarized in his annual report to the Trustees of the Endowment dated April 10, 1929:

> I. International law must be considered as a legal system before it can be expected to control the conduct of nations. A consequence of the Pact of Paris involves recognition of international law upon a footing of equality with other branches of jurisprudence.
>
> II. International law should be stated by and with the coöperation of the nations whose conduct it is to control. In the language of our day, international law is to be codified. It is being codified in Europe by international agencies of an official character, such as the Hague Peace Conferences, and by a scientific organization, the Institut de Droit International; in America by official agencies such as the International Commission of Jurists at Rio de Janeiro, the Sixth Pan American Conference of Habana, by the Research in International Law of the Harvard Law School—a learned and unofficial body composed of members from one country (the United States)—and the American Institute of International Law, a scientific organization with representatives from each of the twenty-one Republics of the Western World.
>
> III. The law of nations is to be analyzed, commented upon and diffused, in order that its obligations may be known of men as well as of nations. This is the mission of the Academy of International Law of The Hague, founded with the aid of the Carnegie Endowment for International Peace.
>
> IV. There must be a Permanent Court of International Justice in addition to international agencies repudiating force between nations, in order to apply to the concrete controversies of States the law of the international community.
>
> V. Under a system of law the rule of States should be coöperation, not competition.[73]

Although it may be claimed by some that no progress has been made in the world toward the attainment of the great object for which Mr. Carnegie made his munificent benefaction thirty-three years ago, it cannot be denied that the Division of International Law under Dr. Scott's direction gave the most intelligent thought, followed the most promising lines of activity, and worked as hard and consistently as is humanly possible toward the development of international law as one of the means of achieving the Endowment's goal. Before Dr. Scott began his crusade, international law as a science had barely emerged from the cloister; indeed, not so many years before it had been taught in connection with theology. The subject is now included in the curricula of many colleges and universities and of the larger law schools in the United States. Specially qualified professors, in the larger institutions more than one, devote their whole time to teaching it. The classes are numbered by the hundreds and the students by the thousands. No statement made by informed leaders of opinion in this and other countries has been or can be made regarding the restoration of peace and order in the

[73] Carnegie Endowment Year Book, 1929, pp. 129–157.

world without basing their hopes upon the foundations of international law. It is true that Dr. Scott was in a favored position to carry on his work as few men have ever been. Because of his service with the Carnegie Endowment, he was able to devote all of his time and thought to his "hobby" without interruption, and he had ample funds at his disposal to employ the necessary assistance and to meet the financial requirements for carrying on his work; but it is primarily due to his own great abilities which so perfectly fitted him for this position that he accomplished the Herculean tasks he has to his credit.

FINIS

After retiring from all of his activities on June 30, 1940, he went to live in his summer home at Annapolis, Maryland, where he died June 25, 1943. Whether the half century following his graduation from Harvard College were but "a rainbow span of fifty years" and the advances to which he so effectively contributed toward an era of peace based upon justice among nations have been permanently obliterated by the brutal forces of war, history only can tell.

Speak, History! Who are life's victors?
Unroll thy long annals and say;
Are they those whom the world calls
the victors, who won the success of a day?
The martyrs, or Nero? The Spartans
who fell at Thermopylae's tryst,
Or the Persians and Xerxes? Pilate, or
Christ? [74]

[74] William Wetmore Story. *A Poet's Portfolio: Io Victis.*

THE EMERGENCY ADVISORY COMMITTEE FOR POLITICAL DEFENSE

By CARL B. SPAETH,
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I. INTRODUCTION

The war and the present preoccupation with post-war plans have brought about a general awareness of the fact that the Americas have been a testing ground for the orderly organization of relations among sovereign states, especially in the development of coöperative principles and techniques. The construction of a political organization within which these principles and techniques could be consolidated has not, however, characterized the American experience. The Pan American Union, for example, is expressly denied the right to consider political or controversial questions,[1] and proposals for the creation of a "league" or "association" of American states has met with courteous but definite coolness.[2]

It is for this reason that the development of the inter-American consultative procedure during the dangerous years immediately preceding the outbreak of the Second World War and its application during the war is of such significance. As in the case of the recent meetings of Moscow, Cairo and Teheran, the procedure is the product of a compelling community of interests among a group of states, and reflects the absence of a permanent international structure to supply the means by which such states can arrive at joint political decisions of an emergency character.

The parallel does not end there. The application of the technique has in both Europe and America led to the recognition of the need of organization which shall give continuity and permanence to *ad hoc* consultations. In Europe this need has been met by the creation of the London, Italian and Mediterranean Advisory Commissions. In America the first meeting of consultation of the Foreign Ministers, held at Panama in 1939, created two advisory bodies: the Neutrality Committee of Rio de Janeiro (now the Inter-American Juridical Committee) and the Economic and Financial

[1] The statutes of the Pan American Union provide that "neither the Governing Board nor the Pan American Union shall exercise functions of a political character." Paragraph 3 of the resolution of the Sixth International Conference of American States, *International Conferences of American States*, Carnegie Endowment for International Peace, p. 397.

[2] See Resolution XIV on Association of American Nations, Eighth International Conference of American States, *ibid.*, First Supp., p. 245.

Committee of Washington.[3] Fourteen months later the third meeting, held at Rio de Janeiro after Pearl Harbor, created two new bodies, the Military Defense Board at Washington and the Emergency Advisory Committee for Political Defense at Montevideo.[4]

All these entities are examples of advisory bodies appointed to implement general policies agreed upon by the governments and to consider in an expeditious manner such new issues as arise out of changing circumstances in an emergency period. Along with the executive and administrative agencies for military, economic and humanitarian coöperation among the United Nations, these emergency advisory bodies in Europe and America may have far-reaching implications with respect to the "international organization" which it is now generally taken for granted will be created after the war.

Of the group of entities of this character established to date perhaps the Committee for Political Defense represents the most radical departure from past experience and tradition. While none of its characteristics can be said to be entirely new, their peculiar combination in and application by the Committee is in many respects quite novel. It is for this reason that the means and manner by which the Committee has fulfilled its assigned task appears to be of as much interest as its actual accomplishments. While the latter have vital importance in the defense of the Americas against dangers arising out of the present conflict, the former may foreshadow developments of significance to the future of inter-American relations.

II. Creation of the Committee for Political Defense

Background. Although the Americas became the victims of military aggression on December 7, 1941, they had been the object of a systematic "softening" process based on a well-planned and executed political and psychological offensive for years before that date. This offensive was carried on through Axis nationals, diplomatic missions, cultural, financial, commercial and transportation organizations, and some disloyal citizens of American states.

The three principal techniques of penetration were the traditional espionage agent and the saboteur; the welding into an integrated system for subversive activities of all commercial, cultural and religious contacts with the American Republics existing within Germany and its satellite and occupied areas; and the penetration of the life of the several republics by the full utilization of American political, economic, social, cultural and religious institutions. Moreover, the all-pervasive Axis propaganda, which had

[3] Resolutions III and V of the First Meeting of the Ministers of Foreign Affairs of the American Republics. *Ibid.*, First Supp., pp. 322 and 326.

[4] Resolutions XVII and XXXIX of the Second Meeting of the Ministers of Foreign Affairs of the American Republics. Pan American Union, Congress and Conference Series, No. 36, pp. 44 and 59.

yielded such excellent results at home and in Europe, became the handmaiden of these techniques by creating confusion, division and intolerance. In other words, in the Western Hemisphere the political warfare program of the Tripartite Pact was fully integrated with their world political-military strategy.

However, it was only after the military offensive had begun on other fronts, and after the fate of the European nations which sought protection in neutrality had brought the lesson home to them, that the American republics slowly and reluctantly recognized and took tentative measures to protect themselves against this menace.

The First Meeting of the Ministers of Foreign Affairs in October 1939 merely agreed, pursuant to the neutrality objective of the gathering, that an exchange of views or a conference should be held to facilitate the prevention or repression of unlawful activities undertaken by individuals "in favor of a belligerent state."[5] In another resolution the meeting came closer to acknowledging the real source of the danger by recommending that the governments take measures to eradicate "the spread of doctrines that tend to place in danger the common inter-American democratic ideal."[6]

When the Second Meeting was held nine months later, developments in Europe and disclosure of active subversive campaigns in some of the republics had shed considerable light on the real significance of certain diplomatic, educational, business and scientific undertakings of Axis nationals and representatives. The conclusions adopted by this meeting were consequently more specific, although falling short of the final step of naming names. The Ministers of Foreign Affairs agreed that measures should be taken to prevent "political activities of foreign diplomatic or consular agents . . ."; that precautionary measures should be taken in the granting of passports, and that the entry of nationals of non-American states should be vigorously supervised. It also recommended effective police supervision of foreign non-American groups, and proposed that measures be taken to prevent and suppress any illegal activities in any way controlled by foreign governments, foreign groups or individuals.[7]

At the Third Consultative Meeting, held six weeks after Pearl Harbor, pretense was no longer necessary. In Resolution I the governments recommended the breaking of their diplomatic relations with the Axis, and in Resolution XVII they agreed on a political defense policy for the individual and collective defense of the continent, including the creation of a committee to advise them on the implementation of that policy.

The creation of the Emergency Advisory Committee for Political Defense responded to an imperative need for effective action. The efficacy and

[5] Resolution VIII on Coördination of Police and Judicial Measures for the Maintenance of Neutrality. Carnegie Endowment, *op. cit.*, First Supp., p. 331.

[6] Resolution XI, *ibid.*, p. 333.

[7] Resolutions II, III, V, VI and VII, *ibid.*, pp. 351, 353, 354.

scope of political aggression was no longer a matter of conjecture; the evidence accumulated in Europe and America was impressively convincing. Moreover, the attack on Pearl Harbor had taken place only six weeks before, the North African campaign was still eight months away, and Dakar was uncomfortably close to the hump of Brazil. There is, therefore, an understandable ring of conviction in the statement by the Foreign Ministers in Resolution XVII to the effect that the gravity of the danger required "additional and more stringent" defense measures against the political aggression of the Axis, which is "both preliminary to and an integral part of a program of military aggression."

These considerations are basic to an understanding of the somewhat novel characteristics of the Committee for Political Defense. The Committee was created in a moment of grave danger to the Americas, when the effectuation and coördination of measures for joint defense against a constantly changing type of attack from within was an imperative practical necessity, not a mere matter of convenience in the accomplishment of a desirable objective of international coöperation. A full realization of the implications of the situation determined the policy approved and the organization established in Resolution XVII.

Procedure of appointment and organization. This sense of urgency and of pressing danger is reflected in the provision of Resolution XVII requesting the Pan American Union to organize the Committee within the ensuing six weeks. The pertinent provision reads:

> That, to study and coördinate the measures recommended in this resolution, the Governing Board of the Pan American Union shall elect, prior to March 1, 1942, a committee of seven members to be known as "The Emergency Advisory Committee for Political Defense."

The Union was also requested to determine the functions of the Committee, prepare its regulations and fix its budget of expenditures, "after consulting the governments of the American Republics."

The report of the special subcommittee appointed to propose ways and means by which the Pan American Union could fulfill the foregoing directive emphasized that the Committee for Political Defense was empowered "to study the problems relating to the political defense of the continent in its broadest scope, and to recommend measures intended to give effect to this object," and advanced a series of recommendations for the immediate organization of the Committee and the prompt inauguration of its work. A proposed draft of by-laws for the Committee accompanied the report.

This report was adopted by the Governing Board on February 25, 1943, *ad referendum* the approval of the governments. After the governments had been consulted by their representatives on the Board, the latter gave its unanimous and unqualified assent on April 6. In accordance with the terms of the report, Montevideo was selected as the seat of the Committee

and the members were named by the governments of Argentina, Brazil, Chile, United States of America, Mexico, Uruguay and Venezuela.[8]

At its first meeting, held on April 15, 1942, Dr. Alberto Guani, former President of the Assembly of the League of Nations and Minister of Foreign Affairs of Uruguay and now its Vice President, was elected chairman of the Committee.

Pursuant to Article 2 of the by-laws the seven members of the Committee, "although designated by the seven governments selected in the manner indicated in the preceding article, shall represent and shall function on behalf and in the interest of all the governments, members of the Pan American Union." The significance of this provision will be considered below.

Budget and internal organization. As indicated above, the Foreign Ministers at Rio de Janeiro, with a realistic understanding of the factors which determine the difference between an effective and an ineffective international instrumentality, expressly provided that the Committee for Political Defense should have the necessary funds for its work. Article 13 of the by-laws implements this stipulation; it provides that Committee expenses shall be apportioned among the governments on the basis of population.[9]

Internally the Committee has been organized so that it can deal expeditiously and in a practical manner with the task which it must perform. In accordance with the by-laws, it has a permanent Secretariat appointed by the Government of Uruguay, and a technical consultant and two assistants appointed by the Committee. It has appropriate subcommittees to study the variants of Axis subversive activities and the relevant legislative and administrative control measures in the republics, as well as the suggestions and proposals received from the governments. On the basis of this

[8] The original appointments, in the order of countries named, were: Miguel Angel Chiappe, Mario de Pimentel Brandao, Joaquín Fernández y Fernández, Carl B. Spaeth, Carlos Darío Ojeda, Alberto Guani, Eduardo Arroyo Lameda. The following changes have since taken place: Guillermo de Achával, former Argentine Minister to Poland, replaced Miguel Angel Chiappe with the Committee as his exclusive assignment; General Pedro Goes Monteiro, ex-Brazilian Chief of Staff, replaced Mario de Pimentel Brandao upon the latter's designation as Ambassador to Spain; Alfredo Rodríguez MacIver, Chilean Ambassador to Uruguay, replaced Fernández y Fernández upon the latter's appointment as Chilean Foreign Minister; Mariano Armendáriz del Castillo, Mexican Ambassador to Uruguay, was designated to the Committee when Carlos Darío Ojeda was appointed Mexican Ambassador in Buenos Aires.

[9] Pursuant to Art. 23 of its Internal Regulations, approved on April 20, 1942, the Committee relies for this purpose on the population figures used by the Union in determining the quotas of its members.

The Governing Board understood that the salary and transportation expenses of the members would be paid by their own governments, but, upon inquiry from the Committee, it later held that this does not apply to travel and subsistence expenses of members and officers of the Committee while traveling on official business. Such expenses are borne by the Committee.

study, the subcommittees prepare draft resolutions or programs of action for consideration by the full Committee.

In accordance with Article 10 of the by-laws, a majority of the members constitutes a quorum and a majority of votes is sufficient for approval of any proposal or resolution before the Committee. As a general rule, members may enter reservations to majority decisions, but as the decisions of the majority are treated as the decisions of the full Committee, no reference is made to dissenting votes or opinions when the conclusions of the Committee are communicated to the governments.

Instrumentalities of communication and contact between the Committee and the Governments. In the report approved by the Governing Board on February 25th it is emphasized that to do practical and efficient work the Committee "should have easy access to and consultation with government officials and freedom of access to the information necessary for carrying out the objectives of the Rio resolution." Accordingly, provision was made in the by-laws for the means by which this access could be assured and facilitated.

The first of these means was a request that each government designate "a qualified official who shall reside in the capital city of his respective country and who shall serve as a contact between his government and the Committee."[10]

As this system of liaison officers necessarily involved resort to correspondence as the means of contact and communication, it was not considered adequate to meet the Committee's need for practical and effective action. For this reason the by-laws provide for direct personal contact between the Committee and officials of the governments. The method is defined in Article 9, which provides that "in the performance of its work the Committee may designate one or more of its members to visit the different countries members of the Pan American Union."

These consultative visits are complementary of the rôle of the liaison officers. Only the two together give the Committee adequate channels of

[10] All but three of the governments have appointed these liaison officials. In its Resolution No. I, approved April 24, 1942, the Committee set forth the essential functions which in its opinion should be performed by these officers, as follows:

(a) Consultation with all the interested government agencies with respect to the steps to be taken to effectuate each recommendation from the Committee for Political Defense and the maintenance of regular and continuous contact with all such agencies as their work relates to that of the Committee;

(b) Providing the Committee with information concerning the legislative and administrative measures undertaken by the government to prevent, control and punish subversive activities and with respect to action taken pursuant to the Committee's recommendations;

(c) Submission to the Committee of any proposals or projects which might be used as a basis for further study or recommendations to the other American governments.

contact with the governments and with the realities of the situation in each country. The liaison officer is a permanent communications link between the Committee and the government; the consultative visits offer the members of the Committee and national officials an opportunity for personal discussion and mutual assistance in the development and implementation of effective action programs.

For the purpose of furthering the objectives sought through the appointment of liaison officers and the provision for consultative visits, the Committee proposed to the governments at an early date two complementary instrumentalities: national (inter-departmental) committees of political defense, and regional or general meetings of operating officials.

The first responds to a definite need for an organization or arrangement in each country which shall establish a close and continuous working relationship among all of the departments and agencies of the government concerned with political defense. Since many of the recommendations of the Montevideo Committee relate to the work of several agencies in each country, it was obvious that a joint consideration of their common problems was essential.[11]

The idea of regional or general meetings of national officials is a product of the deliberations of the Inter-American Conference of Police and Judicial Authorities held at Buenos Aires in May and June, 1942, which was attended by five of the members of the Committee as delegates of their governments. The Conference approved a resolution suggesting that the Committee call meetings of national officials charged with the administration and enforcement of laws and regulations against subversive activities. This suggestion was approved by the Committee and on August 27, 1942, it adopted a resolution outlining the procedure for the convocation and holding of such meetings.

The regional or general meetings are designed to test the practical utility of the Committee's recommendations and to afford operating officials an opportunity for discussion of common problems and exchange of information. As the objectives of these meetings are similar to those of the consultative visits, the Committee has resorted to the procedure of the above-mentioned resolution on only one occasion[12] and has reserved it for use in special emergency cases affecting a region or the continent as a whole.

[11] The Inter-American Conference of Police and Judicial Authorities, held at Buenos Aires in May and June 1942, also recognized the need for these national committees in its Resolution No. XIV.

[12] The regional meeting on Entry and Exit of Persons and Clandestine Crossing of Frontiers was held in September, 1942, at Rivera, on the frontier between Uruguay and Brazil. The meeting was attended by two members of the Committee and by operating officials of Argentina, Brazil, Uruguay, Bolivia and Paraguay. Its object was to determine the emergency measures necessary to stop the clandestine crossing of Axis agents from Brazil into neighboring republics occasioned by the former's declaration of war on the Axis on August 23, 1942.

III. Declared Policy and Representative Principle

Policy. The Committee has concerned itself almost exclusively with ways and means of combatting the political warfare of the Axis. Concentration on the action assignment was made possible by the detailed declaration of controlling policy which was approved by the Foreign Ministers at the time of the Committee's creation. The Committee's has been a "line" responsibility, the "staff" having determined, in Resolution XVII and the memorandum attached thereto, the objectives and the general tactics for their realization.

The resolutions of Panama and Havana relating to subversive activities proposed general security measures for the defense of the state and its institutions, and were consistent with neutrality. Resolution XVII of the Rio meeting declared that acts of aggression had been committed against an American state, which, within the provisions of Resolution XV of Havana, were to be considered as acts of aggression against the community of American states.[13] The resolution then stated the policy basis for hemisphere defense against political attack by the named aggressors.

The policy declaration of Resolution XVII was a direct and necessary complement to the termination of diplomatic relations with the Axis recommended by Resolution I. Resolution I recognized that the directing and coördinating heads of Axis subversive activity were to be found in the diplomatic missions of Germany, Japan and Italy. Resolution XVII made it clear that the measures to be adopted pursuant thereto would necessarily include discriminatory provisions specifically directed against German, Japanese, and Italian nationals and their political, social, and commercial organizations.[14] The discriminatory character of the program contemplated by the resolution would, it was evident, be incompatible with the continuation of friendly diplomatic relations with the Axis. Moreover, Resolution XVII was responsive to the conclusion that the flexible and adaptable character of the Axis organization required that the break in diplomatic relations be supplemented by measures which would destroy the intricate espionage system which had been so well organized through the diplomatic missions.

Not only did the "staff" declaration of policy enjoin a concentration and direction of effort against identified aggressors; it proceeded, in a general statement of tactics, to mark out the areas in which emergency

[13] Paragraph one of the preamble to the resolution recites:

> *Acts of aggression* of the nature contemplated in Resolution XV adopted by the Second Meeting of the Ministers of Foreign Affairs of the American Republics at Habana *have now taken place* against the integrity and inviolability of the territory of an American Republic.

[14] Each of the control measures recommended in the memorandum attached to the resolution contemplated both general safeguards *and* special discriminatory measures against the Tripartite Pact, its nationals or organizations controlled by it. (Italics supplied.)

political defense measures seemed necessary. This statement was contained in the comprehensive memorandum attached to Resolution XVII which specified four general types of control measures and, in considerable detail, stated the basic objectives of each, thus charting the course for the Committee's programs of action.[15]

The Committee took the view in its first annual report "that the twenty-one governments expressly reaffirmed the action taken at Rio de Janeiro when they approved the creation of the Committee pursuant to the regulations prepared by the Governing Board of the Pan American Union."[16] The regulations, together with a detailed report of a special subcommittee, had been submitted to the governments by the Governing Board. Not only did the report specify that the Committee should study, coördinate and recommend measures contemplated by Resolution XVII, but the same resolution was expressly incorporated in the regulations by Article 6.[17] The Committee considered that all of the governments were thus given an opportunity, if they so desired, to qualify their participation in the work of the Committee, not only by reference to its organizational features but also by reference to the policy which was to determine the content of its program. The unanimous and unreserved approval by the Governing Board was deemed tantamount to a reaffirmation of the policy declared by the Foreign Ministers, a reaffirmation which strengthened the Committee's twofold conclusion that it could not deviate from the declared policy and that it could properly anticipate full coöperation from all of the governments.

Although it is accurate to state that the manner of its creation has enabled the Committee to concentrate most of its efforts upon ways and means of implementation, it would be misleading to suggest that it has been concerned exclusively with mechanics, or that the preparation of its programs has not entailed any "policy" determinations. Although the draftsmen of the Committee's charter effectively anticipated most of the fundamental policy questions, the character of the assignment—defense against a shifting and dynamic attack—made the presentation of entirely new problems inevitable. Hence, in some areas, circumstances have imposed a limited policy responsibility upon the Committee.

The most dramatic occasion for the exercise of this responsibility was presented by the Bolivian revolution of December 20. Preceded and accompanied by widespread suggestions that this particular *coup d'état* was the first of a series designed to break down the existing anti-Axis front in South America, it was apparent that a political defense question of great magnitude and urgency had suddenly been precipitated. It was at the same time likewise apparent that the question was novel; there existed neither an agreed policy nor speedy procedure by which the inter-

[15] See the discussion of the so-called "legislative program," pp. 232–234, *infra*.

[16] Annual Report of the committee 1942–1943, English edition, p. 12. [17] *Ibid.*, p. 268.

ested republics could promptly act together to meet this potential threat to their individual and collective security and solidarity.

On December 24, four days after the revolution occurred, the Committee adopted a resolution which supplied both the policy and the procedural needs: it recommended that, for the duration of the war, the American Republics agree not to accord recognition to any new government established by force, prior to full exchange of information and consultation among themselves regarding the circumstances surrounding the revolution and particularly the adherence of the new regime to the existing inter-American undertakings for hemispheric defense. All nineteen interested governments promptly announced their acceptance of this formula,[18] whereupon, on January 5, the Committee adopted a second resolution declaring that the formula was applicable to the Bolivian revolution, and recommending that the usual diplomatic channels be utilized as the procedural mechanism for effectuating the necessary exchanges of information and consultations. Within a brief time, during which those republics also gave consideration to a suggestion of the Mexican Government that a special consultative meeting might be desirable, all interested governments accepted the second resolution and, upon completion of their consultations, announced their respective individual decisions to refrain from recognizing the new regime.[19]

The ability of the Committee to cope with this urgent and unique situation may, in retrospect, well stand as the high-water mark of its functioning.

As another example, evidence that the Germans were seeking to meet an increasingly serious manpower shortage by making excessive demands upon individual republics in connection with proposed exchanges of nationals, induced the Committee to declare that repatriation of Axis nationals, save in exceptional and special circumstances, was contrary to the defense interests of the hemisphere.[20] This policy against repatriation (a subject not touched

[18] Their prompt acceptances in the face of such established doctrines regarding recognition as have developed in the American hemisphere (*e.g.*, the Estrada doctrine of Mexico), dramatically illustrates that the safeguarding of hemispheric security and solidarity are paramount wartime policies of those republics.

[19] It is interesting, and important, to note that the Committee's resolutions did not imply that the governments should reach or announce a joint decision as a result of the consultations; the resolutions provided only for prior exchange of information and consultation, leaving the ultimate decision on recognition to the sovereign and individual determination of each government.

[20] Paragraph A-2 of the memorandum attached to Resolution XVII recommended the establishment of procedures whereby nationals of the Tripartite Pact "deemed dangerous to the country of their residence shall during their stay therein remain in detention or be restricted in their freedom of movement." When undertaking its preparation of the recommended procedures, the Committee was informed that many of the individuals considered dangerous by the American Republics had either requested repatriation or had been included on lists supplied by the Axis as a basis for exchange negotiations. In addition to the manpower consideration mentioned in the text, the Committee recognized that the individuals in question, being well informed about conditions in the country of residence, might be useful in the planning of future subversive activities as well as in actual operations.

upon at Rio de Janeiro) has been accepted by practically all of the republics. Other recommendations of an important policy character were incorporated in the Committee's programs on travel [21] and censorship of international communications.[22]

Representative principle. In carrying out its policy directives the Committee and each of its members represents and acts on behalf of all the American Republics.

As indicated previously, this principle is expressly provided for in Article 2 of the by-laws, which requires that the Committee "shall represent and shall function on behalf and in the interests of all the governments members of the Pan American Union." This stipulation was accepted by the governments, when they gave their approval to the by-laws submitted to them with the Governing Board's report of February 25, 1942.

It is important to note that the only modification suggested in the by-laws when the governments were consulted served to reaffirm and clarify this principle of individual and collective responsibility. As originally drafted, Article 4 provided that the *other* republics, that is, those which had not designated members, should be requested to appoint liaison officers. In its reply, one of the governments pointed to the fact that under Article 2 "each member individually represents the inter-American community as a whole and not his own government exclusively," and suggested, therefore, that all the governments were entitled to designate liaison officers. The correction was accordingly made in Article 4 to the effect that *each* country should be requested to name an official in its capital to serve as a channel of contact with the Committee.

From the foregoing it is clear that the Governing Board of the Pan American Union understood that the responsibility entrusted to it by the Foreign Ministers at Rio de Janeiro was to organize a committee of seven individuals to represent twenty-one governments and not of seven governments to act in the name of and on behalf of themselves and the other fourteen. The method

[21] Resolution XVII had recommended "strict surveillance over all persons seeking to enter or depart from the country, particularly those persons engaged in the interests of member states of the Tripartite Pact." Impressed by the extent to which the Axis Powers employed their own nationals as couriers and liaison agents, the Committee recommended that entrance to the American Republics be denied absolutely to nationals of Germany, Italy, Japan, and the countries dominated by them.

[22] The Committee's study of the requirements of an adequate censorship system, its probable cost and personnel demands, induced the conclusion that it would be unnecessary from a security standpoint and impractical from a cost and administrative standpoint to recommend that each American Republic censor all international communications. It therefore recommended that international communications directed to the following states be censored: (a) any of the states members of the Tripartite Pact or states subservient to them; (b) any non-American state which is not at war against a member of the Tripartite Pact; and (c) any American state which has not broken diplomatic relations with the members of said Pact or which, having broken relations, has not either prohibited all communications with such states or established a strict censorship of communications with them.

of selection of the members, by having seven governments designate them, was merely an incident of the Committee's organization resulting from the urgent need for its immediate establishment.[23]

It is not a mere coincidence that the Committee for Political Defense is the first inter-American entity of limited membership whose charter contains in express terms the principle of collective representation.[24] In view of the Committee's nature and responsibilities, once the decision was made by the Foreign Ministers that the Committee should be composed of seven members and not of twenty-one representatives, that principle became imperative.

The Committee is, in effect, a continuing body of a meeting of the Ministers of Foreign Affairs of the American Republics. These meetings deal only with emergency situations which do not permit the delay or protracted study and negotiations which characterizes the general and technical Pan American conferences.[25] The conclusions of these meetings are generally susceptible of immediate application, unless adopted *ad referendum*. With the adoption of Resolution XVII by an "executive" consultative meeting of the Foreign

[23] Since the Pan American Union was directed to organize the Committee within a period of six weeks, it could not well follow an elective procedure which would give each government an opportunity to vote for the members. Experience had demonstrated that this was not feasible. For example, the original seven members of the Committee of Experts on the Codification of International Law were elected by the twenty-one governments by ballot over a three-year period on the basis of a list of 105 names proposed by the same governments.

[24] Of the existing emergency advisory bodies, the Military Defense Board and the Economic and Financial Advisory Committee of Washington are composed, respectively, of two and one representatives from each country. The Inter-American Commission for Territorial Administration is made up of one representative named by each government party to the convention which created the Commission. The Juridical Committee of Rio de Janeiro has seven members appointed by the Pan American Union, and although its statutes do not give express form to the representative principle under discussion, the Committee has maintained that its members are representatives of the inter-American community and are not delegates of the countries of which they are nationals. Peace-time inter-American bodies of limited membership are: (1) the Committee of Experts for the Codification of International Law, composed of nine members elected by the governments; (2) the three permanent codification committees of Rio de Janeiro, Montevideo and Havana on public and private international law and comparative legislation (at first there was no limitation on the number of members and they were all designated by the host country from among its own nationals; now the host country designates as many as it wishes, but six are appointed by that number of governments selected by the Union); (3) the Committee on Unification of Civil and Commercial Law of Lima, selected by lot from among names submitted by the governments.

[25] The Director General of the Pan American Union has pointed out that: "It would seem to be of the utmost importance not to confuse the Meetings of Consultation with the International Conferences of American States. The former are for emergency purposes to consider problems of an urgent character; the latter are intended to establish broad principles of Pan American policy and to formulate programs of long-range activity." Report on the Third Meeting of the Ministers of Foreign Affairs of the American Republics, Congress and Conference Series, Pan American Union, p. 21.

Ministers,[26] no further negotiation among the governments on the basic policy issue was necessary. The only thing left to be done was implementation within the constitutional framework of each country.

The Committee could therefore be authorized to communicate directly to the governments proposals for immediate acceptance and application and not merely for future consideration and negotiation by their representatives.[27] It submits "action" rather than "study" recommendations. This was feasible because the basic objectives and controlling principles had been previously agreed upon by accredited national delegates, who, next to the President, were the highest policy officers in foreign affairs in each of the twenty-one republics.

In assisting in the implementation, in the specific application of this policy, the radius for the exercise of individual judgment and discretion by the members of the Committee is, consequently, limited to matters which relate to the means for accomplishing the declared objectives. The Committee for Political Defense, an international body of limited membership, could operate effectively in this field as the representative of the twenty-one governments.

However, neither the fact that the Committee deals with means rather than policy, nor that it is an advisory body whose recommendations are not binding on the governments, is by itself sufficient to assure full acceptance of the representative principle. The commitment on policy places a duty on the governments to accept the Committee's suggestions, adopt alternative means or state why the adoption of such suggestions is unnecessary or inexpedient. The Committee had to be in fact, as well as theory, truly representative of the general interest.

It is for this reason that the Committee has invariably insisted, often under difficult circumstances, that it cannot in any manner qualify its "obligation to act in the name and interest of the twenty-one republics without distinctions of any kind, and that in order to achieve this impartiality of representation it must be guided exclusively by the directives agreed upon by the Foreign Ministers at Rio de Janeiro." [28]

The Committee has also repeatedly held that no member may enter a reservation to, vote against, or abstain from voting upon a proposition before

[26] As the consultative procedure is designed to bring together the highest policy officials in international affairs of the twenty-one governments for the purpose of dealing expeditiously with critical emergency problems, it tends to operate within the maximum limits of executive power as exercised in emergency periods. The effect of this on the legal character of the resolutions and declarations of the consultative meetings, on the relationship of these conclusions to those of the general Pan American conferences, and on the jurisdiction of bodies created by such meetings, offers an interesting field of research.

[27] Standard inter-American bodies are generally study entities with long-range tasks of preparing drafts on matters of major international convenience for consideration by conferences on which the twenty-one governments are represented by accredited national delegates.

[28] Annual Report, p. 12.

the Committee for reasons resting exclusively on the interest or desire of the government which designated him. On the issue of abstention the Committee resolved that a member could refrain from voting but that his collective responsibility requires that he reveal the reasons which determine his attitude.[29]

It has also insisted that all the twenty-one governments are on a plane of absolute equality with respect to the Committee and that each one has a right to propose and suggest adequate means to achieve the objectives agreed upon at Rio de Janeiro.[30] But it has also insisted that no government should submit to the Committee or a member any proposal involving alterations of the basic policy, either in its general or specific content or spirit.[31] This applies with equal force to the seven designating governments. If the contrary were permitted to one of these governments, it would follow that the other six could claim the same right. A situation would then be created in which seven governments could modify the principles and policies agreed upon by the twenty-one republics at Rio de Janeiro in Resolution XVII.

The significance of these decisions is that the Committee for Political Defense has taken for granted that the twenty-one governments are individually and collectively committed to the policy agreed upon at Rio de Janeiro in Resolution XVII. For the Committee this is an assumption that no circumstance indicating that one of the governments is following a different or contrary policy is sufficient to displace. It follows that the Committee can be said to represent the twenty-one governments only in so far as these governments adhere to the policy collectively agreed to in Resolution XVII.

It is for the foregoing reasons that the representative principle incorporated in the statutes of the Committee for Political Defense is more than a matter of convenience or a well-intentioned gesture to give abstract satisfaction to the concept of inter-American solidarity. The principle of collective responsibility is a necessary and inherent condition and attribute of its nature as an advisory-action body with a specifically declared policy. Without it the Committee would have been a mere technical study group. The confidence placed in the Committee by the governments and their demonstrated willingness to give its recommendations the fullest possible support arises in

[29] The Committee has insisted that, regardless of any other official, diplomatic, or other responsibility the member may have, when acting within the Committee he is the representative of the twenty-one republics and not of any particular one. Four of the present members have no other official responsibilities than those of the Committee.

Likewise, to remove all possible source of misunderstanding, it has ordered that in all the documents of the Committee where the members are mentioned, the reference should be made to "member designated by (the country)" and not "the delegate or representative of (the country)."

[30] This is one of the principal reasons why the Committee has placed special emphasis on the creation of adequate instrumentalities of communication and contact with each government. See page 223 *supra* for a discussion of these instrumentalities.

[31] Only the twenty-one governments, acting through a conference or by means of a special agreement, have power to make such modifications. See Annual Report, p. 12.

large part from this interplay of declared policy and representative principle. Each of the twenty-one governments, whether or not it had designated one of the members, knew that the Committee was acting within a defined area, and each government had participated directly in the grant of authority to its agent.

IV. Activities

Legislative program. Between April 15, 1942, and June 11, 1943, the Committee submitted twenty-one programs of action to the governments of the American Republics.[32] The programs are detailed applications of the policies of Resolution XVII and are built around the four-fold division of the memorandum attached thereto:

(a) The control of dangerous aliens;
(b) The prevention of abuse of citizenship;
(c) The regulation of entry and exit and the prevention of clandestine crossing of frontiers; and
(d) The prevention of acts of political aggression, including espionage, sabotage and the dissemination of totalitarian propaganda, and the protection of vital information through censorship controls.

In preparing the programs, the Committee studied the problems which called for emergency defense action and investigated the legislative and constitutional structure of the several republics. Because of the complexity of the problems and the variety of laws, the Committee was particularly dependent upon assistance from the liaison officers and national committees, a dependence which explained the early concern with the responsibilities and functions of these national representatives.

The Committee's studies and the information furnished by national officials revealed that, while the statutes of the American Republics prior to the Rio Conference were, in general, adequate to deal with acts prejudicial to the state and its institutions in peace time, they could not readily be utilized to cope with the widespread organization and ever-changing tactics of Axis political warfare. Hence, it became evident that in all of the areas covered by Resolution XVII, proposals would have to be designed to key both legislation and administration to security problems as presented by the war, and, particularly, to cope with the known facts of Nazi organization and method. Therefore, under division (a), mentioned above, programs were submitted on the registration of aliens, certificates of identity, and the detention and expulsion of dangerous Axis nationals, and under division (d) on the protection of ships and port facilities, the censorship of international communications, the protection of inland facilities against sabotage, and clandestine radio

[32] These programs have been printed in full in the Appendix to the Annual Report, pp. 48–220 and are analyzed in Chapter IV thereof, "Resolutions of the Committee and Political Defense Measures Adopted by the American Republics," pp. 24–42.

stations. Under divisions (b) and (c) two comprehensive recommendations were submitted, one on each of the subjects indicated.[33]

Variations in the character of the problems and in legal structure among the republics induced the Committee to base its program on general principles and minimum standards. Resort to minimum standards was deemed imperative as a means of laying the groundwork for a coördinated continental system of political defense. Hence the recommendations did not take the form of draft laws or decrees but, in considerable detail, provided a necessary basis for such laws or decrees. In one of the Committee's first recommendations, Resolution VI on registration of aliens, the decision to recommend only the minimum requirements of an effective political defense was stated as follows:

> The present recommendation is confined to proposals for the adoption of certain general principles and minimum standards, and does not attempt to detail the mechanics of a complete national registration system. Each state will work out such details in the manner best suited to its own requirements. This method will entail a minimum of change in existing registration systems, which are in general adequate, and will take full advantage of previous experience and practice in this field.
>
> It is understood, of course, that the states can adopt a stricter system if they believe it desirable: the project simply offers a minimum basis, the essential elements for the construction of a national emergency system.[34]

Although the programs were not drafted as proposed laws, and were predicated upon the Committee's determination of an adequate minimum effort, they nevertheless dealt with all of the essential aspects of each of the defense measures, and each program was submitted with a covering statement of purpose which emphasized the salient practical objectives. The proposal on registration of aliens, for example, emphasized five essential points, each of which was responsive to weaknesses in existing systems revealed by the Committee's investigation.[35] On the other hand, where, as in the case of censorship of international communications and the protection of port facilities, the controls involved the establishment of new and relatively intricate adminis-

[33] Resolution XV, "Prevention of Abuse of Nationality" (Annual Report, p. 133) and Resolution VIII, "Entry and Exit of Persons and Clandestine Crossing of National Frontiers" (Annual Report, p. 147).

[34] Annual Report, p. 54.

[35] The five points with which the registration proposal was concerned were: (1) Centralization of responsibility and integration of the registration process with supplementary investigations by police and other officials so as to insure correlation of data; (2) Revision of items on which data are requested at time of registration so as to provide more adequate basis for later investigation; (3) Obligatory appearance of Axis nationals every three months; (4) Adequate sanctions in lieu of the nominal penalties imposed for failure to register in many countries; (5) Issuance of a document, keyed to the registration process, as means of identification and to facilitate enforcement.

trative organizations, the proposals not only indicated the essential objectives but described the functions of the several divisions of a minimum working organization. The resolution on protection of port facilities was prepared as a working manual and printed in Spanish, Portuguese and English for port captains.[36]

Although the programs were to be directed primarily against the named aggressors and their nationals, the Foreign Ministers were mindful in the declaration of policy, as the Committee has been in its application, that Axis agents are often not of Axis nationality. Consequently, the measures proposed by the Committee have included general provisions, which are not keyed or limited by reference to nationality and, in addition, special, and often more exacting, measures directed at the Axis national or organization. For example, immediate registration of all aliens was urged as a basic measure; in addition, the Committee recommended that Axis nationals be required to make periodic appearances before police and other officials. Great care was urged in the authorization of travel to and among the American Republics: entry was to be denied completely to nationals of the Axis (with the obvious exception of *bona fide* refugees therefrom). Special measures were proposed with respect to the granting and cancellation of naturalization; in addition, rigorous investigations were to precede the granting of citizenship to nationals of the Tripartite Pact, and special steps were to be taken to cancel the citizenship of former Axis nationals who were using the cloak of American citizenship to facilitate their subversive activities.

The several parts of the legislative program constitute an integrated system of defense. In general, the measures may be divided into two main groups: those concerned with all aspects of control over the individual (registration, detention and expulsion, abuse of citizenship and control over travel) and those concerned with special security problems (protection of ships, ports and plant facilities; censorship; dissemination of propaganda). Within each group and between the groups there is an obvious interrelation. The controls over travel are keyed into the system of registration and surveillance once entry has been attained. The censorship controls, taken with the travel regulations and the measures proposed with respect to clandestine radio stations, provide the means for the effective crippling of the Axis communications network. And supplementary both to the controls over persons and communication facilities are the measures for the protection of ships, ports, mine and plant facilities.

Implementation of the legislative program. With the substantial completion of its so-called legislative program the Committee entered upon the second stage of its work: the "follow-up" on its recommendations to the several governments. In this phase, as in the preparation of the basic programs, the machinery which had been placed at the Committee's disposal for main-

[36] The manual was also printed in the Appendix to the Annual Report, pp. 221–256.

taining contact with operating officials of the several governments was vitally essential.

In the beginning, information as to measures taken by the governments, either on their own initiative or pursuant to recommendations of the Committee, was secured from the liaison officers. A substantial body of information was obtained in this manner, but it soon became evident that, in view of the complexity of the problems with which the Committee was concerned, an effective implementation would require full and frank personal discussions with officials charged with the application of political defense measures.

Early in February of 1943, therefore, the Committee made arrangements for its first consultations with operating officials, and during the months of March and April, conferred with national officials of Argentina, Bolivia, Paraguay and Uruguay. Later, visits were made to the countries of northern South America, the Caribbean and Central America, and to the United States.

Before each visit the Committee laid the necessary groundwork through communications which indicated the scope of the matters in which its representatives would be interested. In each republic the governments appointed special commissions [37] with which the Committee's representatives considered:

(1) The measures taken by each government to carry out the recommendations of Resolution XVII of Rio de Janeiro;
(2) The steps taken by each government in order to effectuate the programs of action recommended by the Committee; and
(3) Joint measures by which the American Republics may more fully coöperate in the development of an effective common defense against the common aggressors.

The consultative visits have, in many respects, been the most interesting and significant development in the work of the Committee. The visits were conducted without formality or protocol, the representatives of the Committee making it clear, usually at the first session, that they hoped to "get down to cases" through a full and frank interchange of views. Hence, when on occasion, there was an evident desire on the part of a national official to describe his program in general terms through unsupported assertions that "all steps had been taken as recommended," the Committee's delegation did not hesitate to press for detailed substantiation. And in all cases such insistence on practical detail was respected as a sincere effort to fulfill a responsibility to the community of American states. An important by-product was the opportunity afforded officials of the departments and agen-

[37] In some countries, the national commissions included cabinet officials; in most countries they were composed of the under-secretaries of state charged with the operating responsibilities of the several departments. In addition, each of the sessions was attended by experts in the subject scheduled for discussion.

cies concerned with political defense within each government to obtain a comprehensive picture of their own national defense program. The Committee's representatives noted a give and take, an exchange of views among departments of government, which, in several instances, was occurring for the first time.

At the end of the consultations, which lasted from four days to two weeks depending upon the size of the country and the complexity of its problems, the Committee and the national commissions agreed upon specific conclusions with respect to the areas of political defense which appeared to require supplementary legislative or administrative action.[38] These conclusions are a country-by-country particularization of the Committee's recommendations, and, of course, vary considerably in content. In many instances, they served to point up specific weaknesses in a particular defense measure by reference to the stipulated minimum standards.[39] In other cases, they have represented applications of the principles of Committee recommendations to situations not previously anticipated.[40] In all instances, the concrete and specific agreements were the joint product of Committee representatives and national officials, arrived at through the direct question and answer interchange of the conference table; and, since the visits, they have served as charters of objectives for the future work of the national committees for political defense,[41] from which the Committee has been receiving regular and encouraging reports of supplementary action.

Both before and during the visits the Committee emphasized that specific

[38] The conclusions, which usually touched, in one way or another, upon all of the Committee's recommendations, were incorporated in memoranda of agreement which were signed both by the national officials and by the Committee's representatives at the closing session of the consultation.

[39] Typical here were the conclusions: (1) that information possessed by immigration, police and military authorities with respect to Axis nationals be correlated, through a centralized agency, with the information secured through registration; (2) that the use of government interventors to control so-called social and benefit organizations of Axis nationals was ineffective to prevent the use of funds for subversive purposes, and that their complete dissolution with appropriate safeguards to prevent reappearance in different form was imperative; (3) that appropriate authorities undertake periodic investigations of the anti-sabotage methods being employed by private companies.

[40] In a number of countries it was found that, although there was an adequate legislative basis for the cancellation of naturalization in accordance with the Committee's recommendations on this subject, few if any proceedings had been instituted against persons of Axis origin who had been engaged in subversive activities. The conclusions therefore provided for a review of the cases of persons of Axis origin who had been naturalized during recent years (the period stipulated was usually the prior ten years) with the view to the cancellation of the naturalization of persons who had been engaged in subversive activities.

[41] National Committees have been formed pursuant to the Committee's recommendations in Argentina, Bolivia, Costa Rica, Cuba, Ecuador, Mexico, Panama, Paraguay, Uruguay and Venezuela. In other countries arrangements have been made for interdepartmental coöperation which look to substantially the same objectives as those contemplated by the Committee's proposal on national committees.

problems within each country were to be discussed only in relation to the measures contained in Resolution XVII and in the recommendations of the Committee. This emphasis was induced by the apparent misunderstanding on the part of one of the republics that the consultative visits were to be concerned only with special problems arising from the peculiar circumstances or conditions within a republic and that they were to take place only when a special problem was presented. The report of the Governing Board made it clear and the Committee has maintained that the consultative visits were to be concerned in a comprehensive manner with all aspects of the Committee's program under Resolution XVII. The visits have enabled each republic to contribute the results of its experience to the collective defense. They have enabled the Committee to test its programs of action by reference to the peculiar factual, legal and institutional characteristics of each country.[42] They have greatly strengthened both the individual and the collective effort and have thus responded to the necessity declared in Resolution XVII "that the American states *individually and in concert* take additional and more stringent measures against groups and individuals that seek to weaken their defenses from within."

In continuing its efforts to perfect defense controls following the visits, the Committee has been in a position to call upon liaison officers and members of national defense committees who are intimately familiar with the purpose and policy of the basic programs and who participated in the definition of the areas in which supplementary legislation and administrative measures seemed necessary. Furthermore, when counselling the national committees on the form and content of such supplementary measures the Committee is now able to draw on the substantial body of material received from all of the republics. This material is being analyzed and evaluated by the office of the Technical Consultant of the Committee with a view to its utilization on a comparative law basis in support of technical communications incident to the follow-up process. It is anticipated that this work of legal scholarship will be ultimately published as a comprehensive, comparative law study of the law and practice of political defense in the Americas.

In a discussion of the Committee's efforts to obtain an implementation of its legislative program, reference is appropriate to its publication of substantiated charges against a continental network of Axis agents operating

[42] The consultative visit to Argentina was of particular interest because it occurred during the extended period of her neutrality. The visit, during the administration of President Castillo, was characterized by a frank interchange of views with respect to the adequacy of Argentine security measures. The report of the Committee's delegation was later transmitted to the Argentine Government for its consideration and comment. In a letter from the Minister of Foreign Affairs, Admiral Storni, addressed to the President of the Committee, which was released to the press by the Argentine Foreign Office, receipt of the report was acknowledged with the statement that its conclusions, "así como la eventual relación entre las Resolucions XVII y I," were being considered by the interministerial committee on political defense. (See *La Prensa*, of Buenos Aires, July 9, 1943.)

from headquarters in Argentina and Chile. Through the publication of two well documented memoranda during the months of November 1942 and January 1943,[43] the Committee not only gave real content to the general assertions of Nazi activities, but it demonstrated the practical character and urgency of the measures being proposed to the American republics.[44] The memoranda described the key rôle of Axis "diplomats," named the party leaders, traced the communications system by courier and clandestine radio through which a constant two-way stream of information was moving between South America and Berlin, and cited the consequences in terms of American lives and property. Almost every fact and incident disclosed by the memoranda contributed to give new practical meaning to the programs prepared by the Committee.

In summary, by means of the "conclusion" technique of the consultative visits, through the informed channels of communication provided by the liaison officers and the national committees, and by the timely publication of evidence of continuing Axis activity, the Committee has gone as far, perhaps, as an *advisory* international body is able and competent to go in securing practical, down-to-earth application of principles and standards conceived in the interest of a community of states.

V. General Observations

The Committee is as much an innovation in inter-American relations as the consultative procedure of which it is a product and an extension. The procedure and its offspring reflect a maturing Pan Americanism. Both have the same basic premise, namely, that inter-American solidarity is a fact; that Pan Americanism has progressed from the realm of aspiration, through the intermediary stage of an inorganic system of principles and techniques of international coöperation, to the point where full use can be made of emergency instrumentalities for joint political decision and action.

The Committee has therefore taken it for granted that the governments meant what they said in Resolution XV of Havana and Resolution XVII of Rio de Janeiro. As representatives of the general interest defined by the governments, the members could not depart from or qualify that interest in any respect in the absence of a new grant of authority and a new definition of interest by the same collective source. The Committee is, consequently, not responsive to the ebb and flow of national policies, in-

[43] These memoranda, "German Espionage Agents in Chile" and "Axis Espionage Activities in Argentina" were given widespread publicity by press and radio. They appear at pp. 86 and 107 of the Annual Report.

[44] When publishing the memoranda the Committee stated:

> In view of the seriousness of the charges which specifically describe activities by Axis agents which threaten the security of the hemisphere, it is highly desirable to give publicity to such information, as well as any other of the same character, since it is of paramount importance to the collective defense of America.

terests and expediencies, except as these involve a general interest recognized by the twenty-one governments.

It is perhaps not too early to consider whether there are significant ideas for post-war organization to be found in the interplay of policy and representative principle and in the organizational and operating techniques which have characterized the Committee.

Such consideration might include the possibility of a generalization of the techniques in a treaty, or in a declaration of principles and procedures, to be applied by permanent or *ad hoc* entities, whether organized for purposes of continental defense or for the prevention of controversies, for inquiry, for conciliation, or for other political questions.

If it were decided to give permanent form to the consultative procedure[45] by granting political powers to the Governing Board of the Pan American Union, or by creating a permanent inter-American political entity paralleling the Union, the experience of the Committee might well be suggestive.[46]

Likewise, the increased resort to international advisory committees, both in Europe and America, prompts the inquiry as to whether certain qualified generalizations which may be drawn from the Committee's experience may assist in determining characteristics which, individually or in combination, are desirable or essential to the effective operation of advisory committees in general.

Throughout its work the Committee has been impressed by the practical working interdependence of its principal characteristics. Each of those characteristics—the declaration of controlling policy by the Foreign Ministers, the representative responsibility of seven members to twenty-one governments, the rule of procedure by majority vote, and the ample machinery for continuing contact and consultation with officials of the several governments—has appeared indispensable to its operations.

The definitive and binding declaration of policy by the Ministers and its reaffirmation by the governments enabled the Committee to concentrate from the beginning on ways and means. Little or no time was lost in debate about the policy of the governments on whose behalf it was acting. Not only had the committee been directed to key defenses to an attack by named aggressors, but the main principles and techniques of that defense had been clearly stated. The prior acceptance of the general policy not only narrowed the range of discussion within the Committee, it facilitated all negotiations with the operating officials of the several governments. That Argentina, and in the early months, Chile, had not acted upon the declared policy did not confuse the responsibility to the community of states.

[45] The United States delegation to the Buenos Aires Conference of 1936 proposed that a permanent consultative commission be established.

[46] Executive and administrative international bodies in the technical, economic and humanitarian fields may also be able to utilize some of the Committee's methods and procedures.

It is not intended to imply that the technique of the advisory committee will always require a prior declaration of policy. It may often be desirable to use such bodies in crystallizing opinion and counseling the participating governments in the formulation of policy. But if prompt action is necessary, the opinion seems well founded that a charter of policy will be highly desirable and particularly when, as in the case of the Committee for Political Defense, the principal task is technical and can be most expeditiously performed by an agency of limited membership.

The choice of limited membership (in lieu of each of the governments nominating a delegate) rendered essential the principle of representation pursuant to which the designated individuals were to act in the name and on behalf of all of the governments. And here the interdependence of this representative theory and the prior declaration of controlling policy becomes apparent: a community of sovereign nations, like a community of individuals, will more readily delegate authority to a representative body, and will more readily act pursuant to its recommendations, if the limits of permissible action are defined in the beginning by an accepted charter declaration of policy.

The Committee has found that its limited membership and the supporting principle of representation have done much more than facilitate the drafting of technical recommendations. They have meant flexibility and a freedom from that burdensome deference to considerations of national prestige which so often characterize the action of a body of delegates, each of whom speaks in the name and on behalf of a sovereign government. They have meant freedom from the rigid tradition of unanimity, an unqualified willingness to act by majority vote and to announce the decisions of the majority as the decisions of the Committee. Controversial issues could be considered on their merits without fear of or concern with diplomatic representations or protests by the governments of members whose views did not prevail. Furthermore, the broad base of their responsibility induced the members to consider the Committee's problems from the standpoint of the best interests of all of the republics; they could not properly act upon instructions from the governments which had been privileged to designate them.

The mechanism for easy and direct communication with the governments was indispensable for a translation of advisory opinion into emergency action. The generalization may be hazarded that a representative international body charged with an action assignment must be buttressed by something comparable to the system of liaison officers, national committees and consultative visits which has linked the Committee to the several governments. And considered by the criterion of benefit to the participating governments, it seems equally clear that, when such an advisory body is created, it will be necessary to establish an adequate special organization, intimately familiar with the work of the entity and with local needs, and

with sufficient status to insure that its recommendations receive prompt and appropriate consideration by departments of government which have been kept currently informed of the preparation and development of those recommendations.

Whether a consequence of the circumstances and character of the Committee's organization, or whether a result of the steady development of the inter-American method of arriving at joint community agreements—or both—, the Committee has met with little or no resistance which could be attributed, even indirectly, to considerations of national sovereignty. And it is submitted that the consultations, during which the Committee representatives interrogated national officials on all aspects of their laws and administration, and frequently urged new or changed responsibilities for agencies primarily concerned with internal security controls, constituted more than a theoretical test of inter-American solidarity. The advisory committee with a job to do, and the working means for doing it, will often be able to place emphasis upon the practical common objective and, in so doing, render irrelevant most theoretical considerations in terms of the national sovereignties of the participating governments.

The future in the Americas of organizations similar to the Committee for Political Defense depends largely on the direction taken by the Pan American movement and the place in it of the consultative procedure. If the idea of a strong political union continues to find little support and the inter-American system continues substantially as now constituted, the consultative procedure will likely remain as the capstone of the existing decentralized political structure. In that event, organizations such as the Committee for Political Defense, either as temporary or permanent products of the *ad hoc* consultations among the Foreign Ministers, may be found to be indispensable, particularly during the long armistice period which will mark the transition from war to stable peace conditions.

INTERNATIONAL MONETARY AGREEMENTS

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INTRODUCTORY

The international implications of the money phenomenon were to some extent perceived as early as the time of some of the scholastics who found in the universal use of money an instance of the operation of the Law of Nations (*jus gentium*).[1] The latter term, it is true, was employed by the scholastics rather ambiguously, covering also rules observed by all or most nations in domestic relations. A later writer of the seventeenth century, Samuel Rachel, went further. In his Dissertations on the Laws of Nature and of Nations (1676) he advances the idea that the international circulation of many coins—he mentions especially the Turkish Ducats—proves the existence of a Law of Nations in the modern sense of a law governing the relations among independent states.[2]

As a matter of fact the circulation of coins had ever been more or less international in character. Along with the emergence of coins in early antiquity their migration from country to country also sprang up,[3] to come to an end only in the nineteenth century. According to Sombart monetary circulation from the thirteenth to the eighteenth century "bore a definitely international character."[4] Furthermore, on the European Continent an international unit of account appeared in the sixteenth and seventeenth centuries, when, under a common mercantile custom, drafts on the great Fairs were made in terms of the *scutus marcharum*, which really denoted a definite quantity of gold and was payable in diverse gold coin according to current valuation.[5]

Nevertheless Rachel's theory is not tenable. Except for special enactments and customs, the acceptance of foreign coins in the payment of debts,

[1] *Cf.* Francisco Suarez, *De Legibus ac Deo Legislatore* (1612), B.R. I, Ch. 19, Sec. 10.

[2] S. Rachel, *De Jure Naturae et Gentium* (1676), *Dissertatio Altera.* English translation by Bate, E., in *Classics of International Law*, Washington, 1916, p. 216.

[3] See A. R. Burns, Money and Monetary History in Early Times, 1927, p. 43.

[4] *Der Moderne Kapitalismus*, Vol. 1, 1921, p. 409. England was affected comparatively little by the import of foreign coinal, though there was an afflux of Byzantine "besants" after the Conquest, see A. Feavearyear, The Pound Sterling, 1931, p. 22; cf. also W. A. Shaw, The History of Currency, 1896, p. 41. In the American Colonies practically the entire coined currency was foreign; A. Nussbaum, Money in the Law, 1939, p. 164.

[5] Nussbaum, *op. cit.*, p. 310. According to E. Hoyer *Währungsfragen im Codex juris Canonici* in *Festgabe für Oscar Engländer*, 1936, pp. 101, 110, the Roman Curia in the beginning of this century still reckoned in gold *scuti*. Even in 1939, N. Hilling, Procedure at the Roman Curia, 31 mentioned that the salary of the Cardinals was defined in terms of gold *scuti*. In all probability, this unit of account is related to the *scutus marcharum* of old.

and other modes of their acquisition, were not a matter of legal obligation. The foreign coins were accepted or else acquired on grounds of pure expediency; particularly in the case of the Ducats, Florins, and other coins of renown, because of a common trust in their full weight and fineness. Nor could the enactments or customs mentioned above be linked to international law proper.

Such a connection has, however, been established since early antiquity through international monetary agreements. This type of convention has recently been brought to the fore by the discussion of post-war problems. A historical survey of monetary treaties, which will be attempted in the present article, may shed some light on the paths of the future.

Two groups of international monetary agreements, differing in substance as well as in time, must be distinguished. The earlier group is concerned with coins, that is, with metallic circulating media; in the main, the treaties of this group tend to establish a common standard of coinage (metal, fineness, weight, form, impress, etc.), thus being, in a word, *standardizing* agreements. The more recent group centers on "ideal units" or, to use a more familiar term, on "moneys of account" [6] such as the dollar, franc, pound, and so on, their main purpose being to stabilize the value of the respective unit in the international money market; these may be called *stabilizing* agreements.

STANDARDIZING AND KINDRED AGREEMENTS

Standardizing agreements can be traced back to antiquity.[7] As early as 500 B.C. such treaties were concluded between Greek city-states.[8] Community of minting was rare, each city ordinarily retaining this precious prerogative, but, at least in some cases, the treaties seem to have provided for a compulsion upon creditors within the confederate territories to accept convention money in the payment of debts. Convention money circulated normally side by side with local money, but information on this, as on other points, is incomplete. The most striking features of the ancient treaties are their close connection with military alliances and their termination through military defeats.

During the Middle Ages standardizing conventions are principally found in Germany and Italy, where the decay of imperial power resulted in the acquisition of the coinage prerogative by numerous principalities and cities, the latter being quite naturally in the lead of the movement for a better and

[6] Objections to this use of the term "money of account" are pointed out by Nussbaum, *op. cit.*, p. 7. The expression "ideal unit" was adopted in Bates *v.* United States 108, F (2d) 407, 408 (C.A. 7th, 1939). "Unit of account" is more properly used for such conceptions as *scutus marcharum*, "gold dollar," "gold franc," *cf. supra*, p. 242, *infra.*, p. 255.

[7] On monetary conventions in ancient China and Etruria see Burns, *op. cit.*, p. 95.

[8] Detailed information is to be found in Burns, *op. cit.*, p. 90; and in F. Lenormant, *La Monnaie dans l'Antiquité* Vol. II (1878), p. 53.

homogeneous metallic circulation.[9] As in ancient Greece, community of minting was infrequent, whereas community of legal tender seems to have been considered a corollary of unified standardization and was often safeguarded by outright banishment of foreign coin. The conventions are more elaborate in this period, not only because of the progress in the technique of coining, but because of the incorporation of detailed administrative and punitive regulations designed to secure a strict application of the standard agreed upon. A standardizing convention among cities and principalities of the Upper Rhine area, the Rappenmünzbund,[10] existed through almost two centuries, until 1584. Then, after many struggles and reconstructions, the Bund succumbed to Imperial policies which, though with slight success, tried to establish a unified monetary circulation within the Empire or at least within large parts thereof.[11]

In a few instances the medieval conventions, without creating a common standard of coinage, were merely aimed at establishing a unified area of metallic circulation (*circulatory* agreements).[12]

The conventions so far envisaged are intermunicipal or interprovincial rather than international; the first treaty of a truly international kind was concluded in 1469 between the King of England and the Duke of Burgundy.[13] It was of the "circulatory" and reciprocal type and is remarkable also for the fact that it is concerned with gold coins and silver coins alike, whereas the Inter-German conventions of the period are exclusively concerned with coins of silver and of baser metal.

In the first centuries of modern times the territorial disintegration of the European monetary systems was gradually overcome by the rise and consolidation of the great national states which, under the doctrine of mercantilism, were ill-disposed toward concluding monetary treaties. There are in this period a few late instances of the interprovincial and standardizing

[9] See Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte*, 2nd ed., 1926, p. 288; K. T. von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte des Mittelalters*, Vol. III, Pf. 2, 1901, pp. 372, 396, 416; G. Salvioli, *Il Diritto Monetario della Caduta del Empero Romano ai Nostri Giorni*, 1889, p. 111.

[10] Julius Cahn, *Der Rappenmünzbund*, 1901, a typical product of the then dominant "Historical School" of German economic science, exemplifying both its better and its poorer aspects. An important Italian convention of the standardizing type was concluded in 1254 between Bergamo and other Lombard cities. A monograph by Mazzi, *La Conventione Monetario del 1254 e il Denaro Imperiale di Bergamo*, 1882, cited by Salvioli, p. 112, n. 12, was not available to the present writer. Italian medieval conventions were careful to relate their standards to those of the Empire.

[11] Characteristically, the agony of the Bund was made most painful by a purely political motive: the desire of the member-cities to retain as a matter of prestige their coinage prerogative. Cahn, *op. cit.*, p. 202.

[12] Luschin von Ebengreuth, *op. cit.*, p. 289.

[13] See de A. Witte, "*Les Rélations Monétaires entre la France et l'Angleterre jusqu'au 17-ième siecle*" in *Revue de Droit Int. et de Législation Comparée*, Vol. 26, pp. 75, 86 (*1894*). Unfortunately the information offered in this article is rather vague.

type,[14] but it is only in the nineteenth century that monetary subjects reappear in international legislation.

In Germany the foundation of the Zollverein (1833) was the first important step in establishing, under Prussian hegemony, an economic union among the politically separate German states.[15] In 1838 the Union was strengthened by the conclusion of standardizing treaties among the member states of the Zollverein. Though the treaties left considerable divergencies among the coin types to be used in Northern and Southern Germany respectively, at least a fixed ratio between the North German thaler and the South German florin, the standard silver coins of the respective systems,[16] was secured, and restrictions on minor coins were imposed; a special convention provided for prosecution and extradition of counterfeiters.[17] The urge for national unity made these conventions a complete success; after the foundation of the German Reich, the convention currency was merged into the new Reich currency.

From an international point of view a treaty of 1857 between Austria and the member states of the Zollverein [18] offers greater interest. The treaty had been pushed by Austria, anxious to counteract Prussian hegemony. Her financial power fell short of her political ambition.[19] She had long suffered, and was then still suffering, from serious monetary disturbances called forth by the emission of unredeemable paper money and by an ensuing depreciation of her currency. The treaty therefore obligated the member states not to resort to the emission of such paper money and to withdraw existing issues from circulation until January 1, 1859. This was a unique piece of international legislation indeed; a learned commentator [20] very properly likens it to a person's promise never to fall sick. As a matter of fact, exactly on January 1, 1859, Austria became entangled in new political difficulties which led to the war with France and brought about, in the teeth of the fresh treaty, a new emission of unredeemable paper money. As a result the treaty, though formally ended only by the Austro-Prussian war of 1866, became inoperative, except that the silver convention coins made by Austria emigrated to Germany where, under the treaty, they had to be accepted as legal tender. When, in the early seventies, the depreciation of silver set in,

[14] See Shaw, *op. cit. supra*, p. 199 (Brandenburgian-Saxon treaties of 1667 and 1690); Luschin von Ebengreuth, *op. cit.*, p. 290.

[15] W. O. Henderson, *The Zollverein*, 1939. [16] Henderson, *op. cit.*, at pp. 249, 251.

[17] The treaties date from August 25 and 26, 1837 (Martens, *Nouveau Recueil des Traités*, Vol. 14, pp. 292, 294), July 30, 1898 (*ibid.*, Vol. 15, p. 670), May 8, 1841 (Martens, *Nouveau Recueil Général des Traités*, Vol. 2, pp. 56, 65), and Oct. 21, 1845 (*ibid.*, Vol. 8, p. 565). French translations in A. Janssen, *Les Conventions Monétaires*, 1911, p. 473; analysis *ibid.*, p. 3. See also Henderson, *supra*, n.15, p. 139.

[18] Münzverein of Jan. 24, 1857 (Martens, *Nouveau Recueil Général des Traites*, Vol. 16, Pt. II, p. 448).

[19] Information amplifying the account given in the text is found in Janssen, *op. cit.*, p. 38, and B. Nolde *La Monnaie en Droit International* in *Académie de Droit International, Recueil des Cours*, Vol. 27, pp. 247, 369. [20] Janssen, *op. cit.*, p. 69.

the rapidly growing loss fell on Germany; after lengthy negotiations a small fraction of this loss was assumed by Austria. The treaty illustrates the fact that in monetary conventions the mischief of one partner may easily, and even primarily, affect the others. In fact nobody, it seems, drew a real advantage from this monetary product of political ambition.

Another standardizing treaty is found in the Scandinavian Monetary Conventions of 1873 and 1875 between Denmark, Sweden, and Norway.[21] At variance with the German conventions, the Scandinavian treaty was based on the gold standard. Standardization included subsidiary and minor coins and the principle of common legal-tender was extended to the entire range of convention money. Backed by the racial ties and the propinquity of the member countries, and buttressed by stabilizing agreements,[22] the Convention survived World War I. In 1924, however, the circulatory and legal-tender community was ended in respect to subsidiary and minor coins, when these coins were drained from Denmark and Norway by the premium on the Swedish crown; in 1931 the abandonment of the gold standard terminated the intra-Scandinavian circulation of gold coin altogether.

From the viewpoint of universal monetary history the so-called Latin Monetary Union of 1865 [23] constitutes by far the most remarkable instance of a "standardizing" treaty. France, Italy, Belgium, Switzerland, and Greece (1868), were the signatory powers.[24] France was the leader within the Union. Not only were French coins, on the basis of the decimal system long prevailing in France, made the model of the major convention coins in respect to metal, fineness, weight, tolerance, and diameter, but the bimetallistic 1:15½ standard of the French system was embodied in the convention. (Thus history presents us with standardizing treaties of all types—silver, gold, and bimetallistic.) On the other hand, the Latin Monetary convention did not touch upon coins of baser metal or upon paper money. The convention did not even provide for a legal-tender community; instead, the cocontracting governments only undertook to receive the convention gold coin and five-franc silver pieces, wherever coined, in the payment of debts

[21] A. Nielsen, "Monetary Unions" in Encyclopedia of the Social Sciences, Vol. X, p. 598; Janssen, *op. cit.*, p. 105; Nolde, *op. cit. supra*, n. 20, p. 384; R. Agombart, *Politique Monétaire des Etats Scandinaves*, 1930, p. 119.

[22] *Infra*, p. 248.

[23] Full text of the main treaty of Dec. 23, 1865, with all later supplements and amendments up to 1910 in Janssen, *op. cit.*, p. 514; English translations up to 1900 in Willis, *infra* n. 28, p. 271.

[24] For detailed analyses and appraisals of the Latin Monetary Union see H. P. Willis, A History of the Latin Monetary Union (1901); A. Nielsen "Monetary Unions" in Encyclopedia of the Social Sciences *loc. cit.*, R. H. I. Palgrave, Dictionary of Political Economy sub "Latin Union"; Nolde, *supra*, n. 20, p. 372; R. Gruel, *Die Lateinische Münzumion*, 1926; E. Egner, *Der Lateinische Münzbund seit dem Weltkriege;* W. Stark *"Währungsverträge"* in *Festgube für Oscar Engländer*, pp. 263, 271. See also K. Neumeyer, *Internationales Verwaltungsrecht*, Vol. III, Pt. 2, Div. III, 1930, pp. 228, 231.

(community of "public receivability").[25] All this hardly amounted to a "union,"[26] but the overstatement of name goes hand in hand with the far-flung expectations underlying the treaty of 1865, which it was hoped would become the corner-stone of a unified world currency. For this reason the treaty explicitly opened the door for the accession of other countries. But only Greece followed in 1868, while Spain, Serbia, Roumania, the Papal state and some South American countries contented themselves with issuing coins of the convention standard, avoiding, however, any international obligation.[27]

Troubles for the Union started very soon, owing to the depreciation of silver, a fact necessarily destructive of the bimetallistic standard. Decay of the Italian monetary system was another source of difficulties. Repeated serious alterations of the treaties, including the transition to a "limping" gold standard, proved necessary to perpetuate the Union, in which also a point of political prestige was at stake for France. Ultimately the Union succumbed to the aftermath of World War I. In 1921 Switzerland felt herself constrained to cancel the public receivability of the foreign five-franc silver coins and to declare them unfit for circulation [28]—a clear violation of the Union treaties which, committed by an eminently law-abiding country, illustrates the utter impracticability of the Union ties. A convention of the same year,[29] confirming the Swiss measures, practically finished the circulation of the Union silver coins outside the state of issue; circulation of Union gold coin outside Switzerland had stopped anyway, owing to currency depreciation, and was afterwards ended by devaluation which finally struck Switzerland herself.

The basic problem of the Union is well reflected by judicial decisions. When in 1894 an Italian appellate court had to enforce a French judgment calling for the payment of French francs, the court held payment in (depreciated) lira notes of the same nominal amount a lawful discharge of the debt.[30] The Court, it is true, reasoned only in terms of the *cours forcé* of the lira notes—a matter of internal law—without mentioning the Union treaty, but the Court was evidently guided by the idea of a unified franc of the Union. The issue reappeared on a larger scale when, after World War I, creditors of international "franc" loans were offered payment in depreciated (French, Belgian) francs or in liras but insisted upon the payment of "inter-

[25] Nussbaum, *op. cit.*, pp. 42, 155.

[26] The preamble of the 1865 treaty, however, employs the term "union monétaire." In fact the term "Latin Monetary Union" has come to be generally accepted.

[27] One-sided adoption of foreign coin types had long been considered good practice. In the Middle Ages the Emperor, in granting a coinage privilege, would condition it on the adoption of the Florentine florin standard. Inama-Sternegg, *supra* n. 9, p. 411. Only deceptive imitations were unlawful; von Ebengreuth, *supra*, n. 9, p. 59.

[28] *Eidgenössische Gesetzsammlung*, 1921, p. 52.

[29] Martens, *Nouveau Recueil*, III *Sér.*, Vol. 14, p. 220.

[30] Appellate Court of Milan, May 1, 1894; *Giurisprudenza Italiana*, 1894, Vol. I, Pt. 2, p. 705.

national" gold francs as defined by the Union treaties subsequent to the abandonment of the bimetallist standard. The creditors' theory was rejected by the courts;[31] the court of one country unrelated to the Union advanced a particularly thorough and convincing argument in support of its decision.[32] Thus the Union, far from having brought about a world currency, had not even succeeded in establishing a unified "ideal unit" (money of account) for the Union countries.

Today it is familiar knowledge that in a modern monetary economy treaties concerned with coinage alone cannot reach the real source of international disturbances as reflected by the fluctuations of the rates of exchange.[33] In fact, no more standardizing treaties have been concluded, it seems, since the consummation of the Latin and the Scandinavian Unions.[34] Dematerialization of money—that is, its severance from the metallic substratum—has called for new forms of international coöperation. Nevertheless there might be still minor international agreements with regard to circulating media as such. Thus the International Convention for the Suppression of Counterfeiting of Currency, prepared in 1924 by the League of Nations,[35] has been ratified by 25 states. The Convention, in organizing international coöperation against counterfeiters, fulfills a task which formerly was performed by standardizing treaties or their auxiliary agreements,[36] and which has become even more urgent since in recent times the counterfeiting gangs have frequently operated from country to country. To this writer's knowledge there are no reports indicating any actual work done in pursuance of the Convention. This may be explained, in addition to the imperfections of the convention, by the circumstances of the post-war period which probably handicapped the migratory habits of the counterfeiters as well as the coöperation among prosecuting governments. In times to come a more effective international agreement along the lines of the Convention might well be attainable.

STABILIZING AND KINDRED AGREEMENTS

Stabilizing agreements originate in certain unilateral transactions of a

[31] French Cour de Cassation, Dec. 21, 1932, *Journal du Droit Int.*, 1933, p. 1201; Swiss Federal Tribunal, June 27, 1918, *Amtliche Sammlung*, Vol. 44, Pt. II, p. 213, and the decision in n. 32. However, the *franci seu libellae* in which the *Codex Juris Canonici* of 1917 expresses money values (Arts. 534, Sec. 1; 1532; 1541, Secs. 2 and 3), seem to mean gold francs of the Union. Hoyer, *op. cit.*, p. 101.

[32] German Kammergericht (appellate court of Berlin) Sept. 25, 1928, *Juristische Wochenschrift*, 1929, p. 446.

[33] See, *e.g.* Stark, *supra*, n. 24, p. 290.

[34] The Austro-Hungarian monetary convention of 1892 (Austrian *Reichsgesetzblatt*, 1892 p. 652) made internationally binding the identical Austrian and Hungarian monetary laws previously enacted. This did not alter the fact that Austria and Hungary had formed, and continued to form, a united territory from a monetary viewpoint.

[35] Nussbaum, *supra*, n. 4, p. 34, with further references. Cf. also L. Dupriez, "*La Répression internationale du faux monnayage*" in *Revue du Droit International et de Législation Comparée*, Vol. 56. (1929), p. 511.

[36] *Supra*, p. 244 and p. 245, n. 17.

coöperative nature, principally in the aid given by a central bank to the central bank of another country in support of the latter's currency. An early, if not the earliest, instance is found in the aid granted in 1839 by the Banque de France to the Bank of England which was then seriously imperiled by a coincidence of bad crops with a bad financial crisis.[37] Such coöperation may develop into stabilizing agreements where aid is reciprocally promised for the future. Thus in 1885 the Scandinavian central banks supplemented the monetary conventions of 1873 and 1875 by the mutual establishment of accounts on which the accredited central bank was allowed to draw at parity and without charge of interest.[38] In 1894 and 1900 the banks even undertook to receive one another's notes at par, an unusual arrangement which—by creating a limited community of "public receivability" in respect to the notes—bore some resemblance to the standardizing conventions of old. The agreements of the Scandinavian banks were terminated [39] when, during World War I, note redemption and gold exportation were suspended.[40]

A more recent and more important type of stabilizing agreement emerged during the monetary crisis which preceded the present war. These agreements were concluded among governments, thereby indicating a shift in emphasis to the political field. Owing to the restlessness and uncertainties of the period, the agreements lack more or less juridical definiteness. In the case of the so-called sterling block formed in 1934 by Great Britain, some Dominions, and the Scandinavian countries,[41] no documentary evidence of any agreement whatsoever exists; the known facts reveal no more than an actual coöperation of central banks and governments [42] aimed at aligning the foreign exchange rates of the "block" currencies to the rate of the pound sterling. The block came to an end as a result of the outbreak of World War II. As for the "gold block," established in 1933 among the countries of the former Latin Monetary Union and Poland and the Netherlands,[43] we have at least a joint declaration [44] expressing the determination of the block countries to uphold the free operation of the gold standard at the then existing parities and within the framework of the then existing laws. As early as 1934, Poland, Italy, and Belgium, unable to abide any longer by the policies

[37] A. Schleidt, *Die Kooperation der Notenbanken*, 1931, p. 12.

[38] Nielsen, *supra*, n. 21; Agombart, *supra*, n. 21, p. 123.

[39] Regarding some insignificant remnants of the agreements, see Nielsen, *loc. cit.*

[40] Still in 1939 meetings and agreements for coöperation among Governors of Balkan central banks as well as among Scandinavian central banks took place. Bank for International Settlements, Annual Report, 1939/40, p. 145.

[41] S. E. Thomas, The Principles and Arithmetic of Foreign Exchange, 6th ed., 1934, p. 483; B. Foster and R. Rogers, Money and Banking, 1936, p. 522; O. Emminger, "*Probleme des Sterlingblocks*," in *Währung und Wirtschaft*, 1934, p. 157; J. B. Condliffe, Reconstruction of World Trade, 1940, p. 316.

[42] Thus the English Government granted the countries of the sterling block certain financial advantages, Foster and Rogers, p. 496.

[43] League of Nations, Monetary Review, 1937, Vol. II, p. 26; F. Gunnicker, *Das Schicksaldes Goldblocks*, 1939.

[44] The text may be found, *e.g.* in F. Bradford, Money and Banking, 1937, p. 83.

of the block, withdrew. France, the Netherlands and Switzerland followed suit in 1936.

The "Tripartite" agreement of September, 1936, between the United States, Great Britain, and France [45]—and joined in November, 1936, by Belgium, the Netherlands and Switzerland [46]—is more explicit. Identical declarations by the United States and British Treasuries, mentioning the French Government as assenting, proclaimed the inauguration of a common monetary policy in the interest of peace and of world prosperity. More specifically, a common stand, though in vague and non-legal terms, was taken against quotas and exchange control as well as against further measures of devaluation, except for the then pending 1936 devaluation of the French franc. The pronouncements were supplemented by a statement of the American Secretary of the Treasury on November 24, 1936, to the effect that —subject to revocation on twenty-four hours' notice—the United States would buy from or sell to the British and French Governments gold at a rate "advantageous to the public interest," namely $35 per ounce, the legal standard of the dollar; the handling charge would be one quarter of one per cent.[47] Reciprocally, it was declared, the British and French Governments had arranged for corresponding facilities to be afforded to the United States.

Legally the Secretary's statement of November 24, 1936, amounted to a general license granted to the other Governments under the Gold Reserve Act of 1934,[48] which authorized the Secretary of the Treasury to buy or sell gold "upon such terms as he may deem most advantageous to the public interest." While to this extent the statement constituted a unilateral act, the form of an agreement was preserved by the reciprocal pronouncements of the other Governments which, however, were couched in more indefinite terms.[49] Although, under the given conditions, only the non-American countries were the financial beneficiaries of the agreement, the risk taken by the United States was slight because of the short time of notice and because the gold was available only for dollars.

However, the importance of the agreement can not be gauged by its financial terms. It constituted, in the monetary area, a political declaration of solidarity which was designed for, and led to, monetary coöperation far beyond the buying or selling of gold at $35 an ounce. The preponderance of the political factor was brought home in 1937 when France decreed another devaluation of the franc. Nevertheless, the agreement was continued,[50] to be ended only by the war.

The new international activities of governments have been made possible

[45] Federal Reserve Bulletin, 1936, pp. 759, 980 (American statements); Waight, *infra*, n. 51, pp. 169, 171 (British statements); League of Nations, Monetary Review, *supra*, n. 43, p. 30; Günnicker, *supra*, n. 43, p. 77; Griffith Johnson, The Treasury and Monetary Policy, 1939, p. 115. [46] Federal Reserve Bulletin, 1936, p. 941. [47] *Ibid.*, 940.

[48] 48 Stat. 337, Secs. 8 and 9; U. S. Code, Title 31, Secs. 733 and 734.

[49] See the text of the English pronouncement in Waight, *infra*, 51, p. 171.

[50] Statement by the Secretary of the Treasury, Mr. Morgenthau, of July 1, 1937, Federal Reserve Bulletin, 1937, p. 547.

through the "stabilization funds," a characteristic creature of the recent world crisis. After England had been compelled to abandon the gold standard, she created (in 1932) the Exchange Equalization Account to be controlled by the Treasury, for the defense of the pound.[51] Other countries followed;[52] the United States by establishing under the Gold Reserve Act of 1934 the two-billion-dollar "Stabilization Fund."[53] The stabilization funds —"equalization accounts" differ by name only—are principally designed for the protection of their respective national monetary system in the international money market. Nevertheless intervention in favor of other currencies may be within their scope and purpose, considering the interdependence of currencies which was so strikingly revealed in 1931 when collapse spread with lightning speed from Austria to Germany, from there to England, and from England all over the world.[54] And, inevitably, political considerations will enter the selection of these foreign currencies to be supported by the fund. The American fund, which, from its foundation, was never seriously called upon to defend the dollar, spent its main efforts in supporting currencies of countries politically aligned with the United States.[55] It was the fund which made the Tripartite agreement a live institution and which extended powerful help to the Chinese [56] and later to the Mexican [57] currencies. Assistance to the Chinese currency was granted in the form of another stabilizing agreement in which the British Equalization Account participated.

To the stabilizing agreements proper one may link the *transfer-saving* agreements. The latter include (a) *barter* agreements which envisage the exchange of goods (or services) between two nations, the governments serving as quasi-agents of their producers, with whom they will settle accounts in terms of the respective national currency;[58] (b) *payment* agreements pro-

[51] Hall, The Exchange Equalisation Account (1935); Waight, The History and Mechanism of the Exchange Equalisation Account, 1939. The citation in the text is taken from the Finance Act, 1932, Sec. 24 (3); Waight, p. 166.

[52] "Exchange Stabilization Funds" in League of Nations, Monetary Review (Doc. 1937–II. A. 8[1],p.52; Ch. Rist, "*Les fonds d'egalization des changes*," in *Revue d'Economie Politique*, 1938, p. 1535; M. A. Heilperin, International Monetary Economics, 1939, p. 245, and the writers in n. 51.

[53] Gold Reserve Act, 48 Stat. 337, Sec. 10; U. S. Code, as cited, Sec. 822*a;* Johnson, *supra*, 45, p. 92.

[54] B. Griziotti, "*L'Evolution Monétaire dans le Monde depuis la Guerre de 1914*" in *Académie de Droit International, Recueil des Cours*, Vol. 49, p. 109.

[55] Regarding the operations of the fund from 1934 to 1938 see the study by Johnson, pp. 8, 115.

[56] Report of the Secretary of the Treasury for 1941, p. 52. In order to meet constitutional objections, the Secretary pledged himself to undertake similar actions only with the agreement of the Congressional committees.

[57] New York Times, June 4, 1943. Regarding a seemingly abortive U. S.–Argentine agreement ("between old and good friends") of December 28, 1940, see Report of the Secretary of the Treasury, *supra*, n. 56, pp. 53, 359.

[58] Barter agreements, however, are not necessarily prompted by monetary considerations. The latter were apparently absent, for instance, in the Anglo-American barter agreement of June 23, 1939 (exchange of cotton for rubber), Department of State Bulletin, 1939, p. 547.

viding that a country under exchange control (country A) make funds available for payments due to country B (or to B citizens), particularly by using for this purpose remittances made from B to A in return for goods bought by B;[59] (c) *clearing* agreements by which two countries under exchange control compel their residents to pay debts due to residents of the other country into their respective national clearing office, whereupon the two offices will settle national balances as far as possible by set-off;[60] and (d) *standstill* agreements, that is, consented moratoria designed to meet difficulties of transfer rather than insolvencies of debtors. Though basically private in character, these belong to the group of transfer-saving conventions where the governments directly or indirectly participate in the agreement, *e.g.*, in the case of American-German standstill agreements of 1931 and the following years.[61]

The transfer-saving agreements, then, are definitely bilateral and legal in character. They by no means indicate the existence of political solidarity; the reverse rather would, in many cases, be true. Consequently, they are *stricto jure* in the sense that they do not imply more than their face value. The preferential treatment which they establish—like that of the barter, payment and clearing agreements—runs counter to the spirit of the stabilizing agreements proper, which are aimed at an all-around beneficial effect. In a broad sense transfer-saving agreements may be counted among stabilizing instruments but they are very definitely *ersatz* instruments.

STABILIZATION THROUGH INTERNATIONAL BANKS

Through international agreement stabilizing functions may be conferred upon banks or similar institutions. This was done by a treaty concluded on May 11, 1940, between Colombia, the Dominican Republic, Ecuador, Mexico, Nicaragua, Paraguay, and the United States.[62] The treaty provides for the creation of an "Inter-American Bank" with far-reaching powers in the monetary field[63] but the bank has as yet remained a project.[64]

[59] Great Britain Treaty Series, 1934, No. 22, and 1935, No. 26 (Germany); *ibid.*, 1934, n. 2. (Argentina); Nussbaum, *supra*, n. 4, p. 508.

[60] Schneider, *Der Welthandel im Clearingverkehr* (undated; 1938?), a detailed and informative study; O. Bourdeaud'huy, *Accords de Compensation et Conventions de Paiement*, 1938, dealing principally with Belgian conditions; Nussbaum, *supra*, pp. 505, n. 1, 508, with further references.

[61] Nussbaum, *op. cit.*, p. 507, with references.

[62] Department of State Bulletin, 1940, Vol. I, p. 512.

[63] By-Laws, Art. 5, "Purposes and Powers," where it said that the bank may "encourage general direct exchanges of the currencies of American Republics; encourage the maintenance of adequate monetary resources; promote the use and distribution of gold and silver; *facilitate monetary equilibrium* (italics the writer's); function as a clearing house for the transfer of international payments"; etc.

[64] Many earlier projects have never grown beyond the phase of literary discussion. For references and criticism see P. Mendès-France, *La Banque Internationale*, 1931, p. 23; C. Karamikos, *La Banque des Reglements Internationaux*, 1931, p. 121; H. L. Schlüter, *Die Bank für Internationale Zahlungsausgleich*, 1931, p. 115; W. Trimborn, *Der Weltwährungsgedanke*, 1931, pp. 70, 74, 82, 84.

The Bank for International Settlements (B.I.S.) in Basle,[65] a "bank of central banks," was, as is well known, principally created for the settlement of the Reparation payments under the treaty of Versailles. Nevertheless, the bank was equipped with powers permitting more general activities in the monetary field,[66] and in many quarters it was confidently hoped that the B.I.S. might be able to contribute considerably to a restoration of mutual understanding in international finance and to an improvement of the world's monetary mechanism.[67] Those hopes did not materialize, however.

When, in May, 1931, the Austrian financial crisis broke out, the B.I.S., fully aware of the danger, tried, without delay, to secure an international loan for the Austrian central bank in support of the Austrian shilling, but the consummation of the loan was delayed, because the Banque de France, in this hour of supreme necessity, made its coöperation dependent upon political conditions which the Austrian bank felt unable to accept. The Bank of England, therefore, decided to grant the Austrian bank an intermediary credit of 100,000,000 Austrian shillings (then about $14,000,000). Thereafter, under the lead of the B.I.S., international loans of 150,000,000 and 100,000,000 shillings were procured for the Austrian bank, but the aid could not avert the disaster.[68]

Another, and more technical, phase of the B.I.S. activities likewise bears upon international monetary relations. In connection with the Universal Postal and Telecommunication treaties, under which the Postal Administrations must periodically settle their mutual balances on a gold-franc basis;[69]

[65] Writings on the B.I.S. are abundant. Schlüter's book, *supra*, n. 64, is probably the most thorough study on the subject. Among the publications of earlier date there might be mentioned E. L. Dulles, The Bank for International Settlements, 1932 (prolix and with little analytical discernment, but comprehensive) and Griziotti, "*La Banque des Règlements Internationaux*" in *Académie de Droit International Recueil des Cours*, Vol. 42, p. 359. Ample bibliographies covering the years 1929–1932 are given by these three writers. H. Fehr, "*Die Bank für internationalen Zahlungsausgleich im Lichte des Schweizerischen Rechts*," in Klausing-Nipperdey-Nussbaum, *Beiträge zum Wirtschaftsrecht*, 1931, Vol. 2, p. 1445, might be added. Later publications are: L. Fraser, "The International Bank and Its Future" in Foreign Affairs, Vol. 14, p. 452; E. L. Dulles, "The Bank for International Settlements in Recent Years," American Economic Review, 1938, p. 290, and a valuable Berne thesis by Chambaty, *Die Bank für Internationalen Zahlungsausgleich*, 1939.

[66] *Cf.* the articles of association (Statut) of the Bank Art. 22.

[67] The Young Plan itself (Report of the Committee of Exports on Reparations, Cmd. 3343, p. 11) gave expression to the hope that the Bank might "contribute to the stability of international finance and the growth of world trade." Many utterances of writers are much more sanguine. Expectations rather than facts account for the vastness of literature on the subject.

[68] Particulars on the events of May, 1931, are found in Dulles, *supra*, p. 379; W. Schilling, *Die Abkehr Englands vom Golde*, 1935, p. 79; Chambaty, *supra*, p. 69.

[69] Postal Convention of 1934, Sec. 29, in M. O. Hudson International Legislation, Vol. VI, p. 640; Telecommunication Convention of Dec., 1932, Art. 32, *ibid.*, Vol. VI, p. 109. *Cf.* also African Telecommunication Union Agreement of Oct., 1935, Art. 28, *ibid.*, Vol. VII, p. 108 and generally. Nussbaum, *op. cit.*, p. 399, n. 87.

the B.I.S. in 1934 opened accounts in terms of ounces of fine gold upon actual deposits and holdings of gold.[70] The gold accounts which, like other bank accounts, are handled by crediting and debiting, are held with the B.I.S. by central banks acting on behalf of the respective national Postal Administrations. Pursuant to this arrangement, payments of gold francs are made by way of book transfers from one gold account to another, the gold franc being converted into ounces according to its statutory contents of fine gold. The payee central bank will then presumably credit the Postal Administration in national currency on the basis of the rate agreed upon between the central bank and the said Administration; on the opposite side the debtor Administration will be debited correspondingly. As pointed out by the B.I.S.,[71] the procedure makes it unnecessary for the Postal Administrations to agree among themselves on a currency in which the payments are to be made and on the rate for converting the gold francs into that currency; at the same time any loss in terms of gold is eliminated, with no movements of gold required either for the opening of the accounts or for the effecting of changes in them.

The gold-deposit accounts of the B.I.S. were available to central banks also for purposes other than postal settlements, but the size of the transactions on these accounts was never impressive.[72] Nonetheless, the experiment is interesting from the economic as well as from the legal angle. The Hamburger Girobank of 1770,[73] following an earlier Dutch model, had for a century conducted similar accounts in terms of the famous "mark-banco" which in reality constituted the equivalent of a definite quantity of silver; this was even the main purpose of the bank, which thereby provided the mercantile community with a convenient unit of account. The mark-banco which may be considered as an elaboration, on a silver basis, of the *scutus marcharum*, disappeared when, after the foundation of the German Reich in 1871, a valid and unified monetary system was created for Germany. The precedent of the Hamburg bank seems not to have been thought of in discussion and writing on the B.I.S. Instead, in the negotiations preliminary to the foundation of the B.I.S., the French delegate Quesnay, who became the first General Manager of the Bank, proposed to render the "grammor" (money equivalent of one gram of gold) the accounting unit of the B.I.S.[74] The proposal was rejected, and the gold franc (franc-or) was adopted as the basis of the bank's

[70] *Cf.* on these accounts the Annual Reports of the B.I.S. and the valuable analysis by Chambaty, *supra*, at 88. [71] See especially Annual Report, 1938/1939, p. 129.

[72] The gold deposits amounted to a few million dollars, and only a minority of the Postal Administrations utilized the B.I.S. procedure. See the Annual Reports of the Bank, particularly those for 1938/1939, p. 129, and 1939/1940, p. 150, and the item "sight deposits" in the balance sheets; *cf.* also Chambaty, *supra*, p. 92.

[73] On the *Hamburger Girobank*, see Nussbaum, *supra* at 310, with further references.

[74] Dulles, *supra*, 65, p. 30; Trimborn, *supra*, n. 64, pp. 91, 106. Mr. Quesnay's memorandum seems to have been reproduced by Mendés-France, *supra*, n. 64, p. 283; see Dulles, p. 30, n. 20. The term *grammer* had been previously suggested for the same thing by Grote, *Geldlehre*, 1865, p. 568 (citation from *Trimborn, supra*, p. 48).

accounting. The new gold-deposit accounts constituted, on a limited scale, a revival of Mr. Quesnay's idea except that the ounce replaced the gram. It should be borne in mind, however, that, in this particular application, the gold franc was not a monetary unit either, but exactly like the planned "grammor," was a mere accounting unit, namely, the equivalent in currency (coin or paper) of the gold contained in a golden franc-coin.[75] In the case of gold-deposit accounts as arranged by the B.I.S. the legal situation is probably that the depositor becomes co-owner of the whole gold stock in the ratio of his share to the total weight of the stock. Since the latter weight invariably fluctuates, according to the increases and decreases in deposits, the ratio, too, will fluctuate. The situation may lead to complex and disturbing arithmetical intricacies as shown by German experiences with similarly constructed joint deposits of securities.[76] Moreover, the depositor's fractional *in rem* right in the gold stock no longer offers the same security as in the past when the respect of private property was the almost universally accepted rule; at present gold deposits are likely to be requisitioned by the government as well as by an invader. Under these circumstances, not much can be expected from gold-deposit accounts of the B.I.S. type. The accounting units [77] which have met with wider application are of a different kind. The creditor whose claim is couched in terms of such an accounting unit, is ultimately entitled, as an *in personam* right, to a sum in actual money—coin or paper money—to be computed on the basis of the gold (or silver) equivalent of the units owed.[78] A considerable store of legal experience is available in this respect since in the last decades the well-known devices of gold-franc, gold-dollar, gold-mark, etc., have more and more developed into accounting units. For instance, 1,000 "gold dollars," though originally (under the "gold-coin-clause" interpretation)[79] meaning gold coins of a face amount of $1,000, came to mean (under the "gold-value-clause" interpretation) an amount of American dollars, in coins or paper money of whatever kind, equalling the *value* of the gold contained under the law in gold coins of a face amount of $1,000.[80] Gold value clauses have been used in treaties [81] and may assume new importance in post-war international relations.

[75] Nussbaum, *supra*, n. 4, p. 306.

[76] The *Effecten-Sammel-Depot.* See B. Ascher, *Die Rechtsgrundlagen des stückelosen Effectenverkehrs*, 1927, and H. Schumann, *Zur. Frage vom Miteigentum an Sammeldepot* in Klausing-Nipperdey-Nussbaum, *supra*, n. 65, p. 1174, with references.

[77] Not "moneys of account"; *supra*, n. 6.

[78] This was true even where the parties contracted in terms of mark banco. The legal relationship between the *Hamburger* Girobank and its clients was different, however. Nussbaum, *supra*, n. 4, p. 311, n. 53.

[79] See Nussbaum, *op. cit.*, p. 306. [80] *Ibid.*, p. 353.

[81] Gold value clauses are to be found in the Convention for the Unification of certain Rules relating to the Bills of Lading, 1924. (Treaty Series, No. 931, Art. 9, and in the International Wheat Convention, 1933 (Great Britain, *Treaty Series*, 1933, No. 38 (Cmd. 4449) Appendix V. In some other treaties (Nussbaum, *op. cit.*, p. 199, n. 2) the gold clauses are rather in the nature of gold coin clauses.

POST-WAR PLANS

The post-war plans for international monetary coöperation, published by the Governments of Great Britain ("Keynes Plan"),[82] of the United States ("White-Plan")[83] and Canada [84] have met with ample comment of an economic or political nature.[85] A few observations of a more administrative and juridical kind may be added here.

The draft agreements are all planned as multilateral. Conditions for a successful operation of multilateral treaties have been very little investigated as yet. There are a number of multilateral treaties, such as the Universal Postal Union, which have been a success, but the absence of major political factors is conspicuous in these cases. Not infrequently even a relatively slight admixture of political elements has proved fatal in multilateral treaties.[86] In monetary matters, the critical significance of their political bearings appears from our historical account. The more complicated the texture of the treaty, the more the political factor will make itself felt. And the new plans are of a complication entirely unprecedented in the history of international law. Moreover, at variance with the examples of the past, say the Latin Monetary Union, they allow a leeway novel in treaty practice. The confines of the planned organizations are but dimly drawn. It will be the task of the respective Boards which are equipped with tremendous powers, to develop and to define the functions of the new international bodies, and to do this in an ever-flexible fashion as required by the changeability of monetary and international conditions. In this connection the Boards will have to apply such vague conceptions as, for instance, "expansionist conditions impending in the world economy" (Keynes Plan II 7) or the "point of view of the general international economic situation" (White Plan V 3 and 7).

Moreover the decisions of the Board are in most cases designed as discretionary rather than as mandatory which will further invite political dissension. The heavily qualified majorities required under the White Plan for major decisions give point to this apprehension. Under these circumstances it is to be feared that the deliberations of the Board will be slow and ridden with delays. However, monetary developments do not wait and frequently proceed with lightning speed. In the race between events and Board deliberations the chances are not too good for the Board. Paradoxically, the existence of the treaty may even immobilize a signatory Government

[82] *Federal Reserve Bulletin*, 1943, p. 827.

[83] *Ibid.*, 1943, p. 501; revised; *ibid.*, p. 827. The citations of the White Plan in the above text refer to the revised version.

[84] *Ibid.*, 1943, p. 718.

[85] A careful bibliography of "Post-War Currency Plans" has been published, under the date of Jan. 1, 1944, by The Princeton University, Department of Economics, International Financial Section (mimeographed).

[86] Instances are given by the writer in "Rise and Decline of the Law-of-Nations Doctrine of Private International Law," Columbia Law Review, Vol. XLII (1942), pp. 195, 203.

which otherwise would be willing to remedy a situation by independent action. A significant neglect of the time element appears in a provision of the White Plan (V 4) according to which, if the Fund's holdings of the currency of a particular country drop below a certain limit, then the Fund will have to render to that country "a report embodying an analysis of the causes of the depletion of the Fund's holdings of that currency, a forecast of the prospective balance of payments in the absence of special measures" and appropriate recommendations designed to increase the Fund's holdings of that currency, to which the addressed Government will have to pay "immediate and careful attention." Considering alone the time needed for the drafting, deliberation and passing of the report, one may doubt if such arrangements will work out satisfactorily.

From a juristic point of view, exception must be taken to the denomination, in the Keynes Plan, of "bancor" as a "currency" and, in the White Plan of "unitas" as a "monetary unit." In reality both units are conceived by their sponsors as mere accounting units not represented by coins or paper. The inexact denomination is apt to veil legal difficulties inherent in the use of accounting units—difficulties which have clearly appeared in the case of national accounting units such as the gold mark,[87] but might emerge in a different way with the new supranational or rather "multi-national" devices. Attention must also be paid to the fact that agreements in terms of "bancor" or "unitas" would imply gold clauses in the invalidation of which courts have developed an almost incredible ingenuity as soon as the clauses seemed to impair the national interest.[88]

The writer whole-heartedly agrees with the opinion that the necessary post-war reconstruction in monetary matters cannot be achieved except by international coöperation. Still the question is whether for this purpose the strait-jacket of a treaty, and of a long-term treaty with a multitude of reliable and unreliable partners, is the commendable solution for a beginning. Modern experience rather suggests informal or easily dissoluble agreements among a limited number of participants united on the solid ground of common interests and inspired by international good-will. Such tentative agreements under which much of the official plans might be used as statements of policy, may then gradually solidify by experience and eventually crystallize into more rigidly defined and more comprehensive conventions.

[87] Nussbaum, *op. cit.*, Sec. 27, p. 326.
[88] *Ibid.*, pp. 335, 351, 355.

TAXATION OF FRIENDLY FOREIGN ARMED FORCES

By CHARLES FAIRMAN and ARCHIBALD KING[1]

In the October, 1942, number of this JOURNAL, was published an article by one of the present authors dealing with the jurisdiction of the courts of one country over the personnel of the armed forces of another friendly country at the time on the soil of the former.[2] The presence in so many instances, in the war now raging, of the armed forces of one power in the territory of another was mentioned as the reason for the timeliness of that article.[3] This situation still continues and makes equally timely an examination of the rights and the practice of a host country with respect to taxation of the friendly visiting forces, their operations, supplies, and personnel.

The earlier article showed that, according to judicial opinions, writers of authority, and treaties, as well as by the military necessities of the situation, when the armed forces of Nation A enter Nation B by the latter's invitation or consent, they are subject to the exclusive jurisdiction of their own courts-martial and exempt from that of the courts of B, unless there be an agreement to the contrary between the two countries or a waiver of the exemption by A. The article began with a discussion of the case of *The Schooner Exchange* v. *McFaddon*[4] in the Supreme Court of the United States. That case dealt with the jurisdiction of a *court* of the host nation, B, over a visiting armed force of a friendly foreign nation, A; but both the language and the reasoning of Chief Justice Marshall are so broad that they clearly cover any exercise of jurisdiction by B over the forces of A. Marshall began by saying:[5] "The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent *sovereign* power" (italics supplied). He then went on to discuss, not the jurisdiction of courts, but the jurisdiction of sovereigns. He said:[6]

> "This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."

[1] Nearly all of the material for this article was assembled by Lieutenant Colonel Fairman; he did not, however, have time to put it in form for publication in this JOURNAL before his departure for duty overseas. He kindly gave permission to Colonel King to do so.

Though the authors are both officers of The Judge Advocate General's Department, U. S. Army, the opinions expressed are their own and not necessarily those of The Judge Advocate General or the War Department.

[2] King, Jurisdiction over Friendly Foreign Armed Forces, this JOURNAL, Vol. 36, p. 539.

[3] *Op. cit.*, p. 539. [4] 7 Cranch 116. [5] *Ibid.*, p. 136. [6] *Ibid.*, p. 137.

Marshall next mentioned two cases in which every sovereign is understood to waive his territorial jurisdiction: first, over the person of a visiting foreign sovereign; and, second, over an ambassador or minister. He continued:[7]

> "3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

An attentive reading of the paragraphs just quoted, as well as of the rest of the opinion, will show that the great Chief Justice was not thinking or writing of the jurisdiction of courts alone. He first says that a sovereign is understood to cede a portion of "his" (*i.e.*, the sovereign's) jurisdiction when he allows the troops of a foreign prince to pass through his dominions. Near the end of the quotation he says that the grant of a free passage implies a waiver of "all" jurisdiction.

As taxation is as much an exercise of sovereignty as is subjection to the jurisdiction of courts, it necessarily follows from Chief Justice Marshall's language and reasoning that the host country, B, by consenting to the entry of the forces of A, must be deemed to cede or waive any right to tax them, their supplies, equipment, or necessary operations.

The *Dictionnaire Diplomatique de l'Académie Diplomatique Internationale,* under the word "exterritorialité," also speaks, not of the exemption of visiting forces from the jurisdiction of the courts, but of their absolute exemption from the jurisdiction of the local authorities. The dictionary says:

> *"On a quelquefois parlé d'exterritorialité en ce qui concerne les troupes étrangères. Il est assez rare, en temps de paix, qu'une troupe militaire circule en territoire étranger de l'assentiment du souverain du territoire. Lorsque cela advient, cette troupe est réputée exterritoriale, en ce sens qu'elle échappe absolument a la juridiction des autorités locales."*

The Russian author, Baron Heyking, uses language similar to that of Marshall in that he speaks of sovereignty and not of the jurisdiction of courts. Says he:[8]

[7] 7 Cranch p. 139.

[8] *Recueil des Cours de l'Académie de Droit International de la Haye,* Vol. 7, p. 318.

> *"L'exterritorialité des corps de troupe en temps de paix.—Si par contre le passage des troupes étrangères a été spécialement autorisé, il est évident que l'État renonce tacitement à ses droits de souveraineté sur ces troupes pendant leur passage, droits qui dépendront exclusivement alors de leur juridiction militaire.*
>
> *"Le corps de troupe est comme le navire de guerre, non seulement le représentant, mais le porteur réel de la souveraineté de son pays, et voilà où est la raison de son exterritorialité."*

It is true that most of the other authorities refer expressly to criminal jurisdiction only, perhaps because that was the particular problem which the judges or authors had in mind; but their reasoning is equally applicable to jurisdiction for purposes of taxation.

In principle there is no basis for a distinction between the two. The reason for the immunity of visiting forces from the criminal jurisdiction of the host country lies in the fact that a commanding officer, especially in war, in order to accomplish the military objects which caused him to be sent to the host country, must have at all times complete control of the persons of his men, their arms, and equipment. But, in the last analysis, the payment of taxes is enforced precisely by compulsion upon the person or the property of the taxpayer. Any such constraint of the person of the visiting soldier would interfere with his military duties and the complete control which his commanding officer must have over him if he is to perform those duties. The only property which the visiting soldier ordinarily has with him is his arms, equipment, uniform clothing, and pay. All of these except his pay are usually the property of his government, and therefore exempt from taxation of another government,[9] but even if they were his personal property any

[9] In Hackworth, Digest of International Law, Vol. II, p. 469, the Department of State is quoted as saying, with respect to the attempted taxation of United States consular property in a foreign country:—

> "It is the understanding of the Department that public property of a government, situated within the jurisdiction of another government, which property is destined for the public use of the government owning it, may properly be held under principles of international law to be generally immune from taxation."

On another occasion (Hackworth, *op. cit.*, Vol. II, p. 415), the Department of State said:

> "It is well settled in international law that the public property of foreign governments is not amenable to the local jurisdiction for tax purposes."

In *French Republic* v. *Board of Supervisors*, 200 Ky. 18, 252 S. W. 124, Jefferson County, Kentucky, had attempted to assess for taxation certain tobacco in a warehouse in Louisville, the property of the French Government. After remarking on the immunity of the French Government from suit in the courts of Kentucky and the impossibility of collecting the tax *in invitum*, the Supreme Court of Kentucky quoted Chief Justice Marshall's opinion in the case of the *Schooner Exchange*, already discussed, and went on to say (200 Ky. 22, 252 S. W. 125):

> "Hence, if one nation enters the territory of another with its consent, for the purpose of mutual intercourse, it does so with the implied understanding that it does not intend to degrade its dignity by placing itself or its sovereign rights within the jurisdiction of the other, and we know of nothing more calculated to degrade the dignity of an independent nation than for another to attempt to exercise over it the sovereign right of taxation."

The court set aside the assessment.

seizure of them for nonpayment of taxes would render impossible the discharge of the duties to perform which he was invited by the host country to enter its territory. Any garnishment or attachment of his pay while in the hands of the paymaster would be an interference with the property of a friendly foreign country and with the duties which the paymaster is directed by the laws of his country and the orders of his superiors to perform. The stoppage of any part of the soldier's pay for the benefit of the host country, even if otherwise permissible, would be most detrimental to his morale and therefore to his military efficiency. The same would be true of any compulsion put upon him after receipt of his pay in order to make him give it up. There is, therefore, no form of compulsion which may be used against the visiting soldier by the host country which is legal and effective.

In theory, and in most cases in fact, the host country invites the friendly visiting forces to enter its territory in order to further its own national policy, as, for example, to defend its soil, to give or receive military instruction, or to engage in joint operations against the enemy. Mademoiselle Aline Chalufour, in the concluding sentence of her able thesis on *Le Statut Juridique des Troupes Alliées pendant la Guerre 1914–18*,[10] says:

> *"* * * nous avons parlé de la présence des troupes alliées et nous la considérons comme la collaboration d'un service public avec le service public correspondant d'un autre État dans un but commun de défense et de securité."*

It would be contrary to the interest of the host country to impose burdens upon the means whereby its own policy is to be carried out and a common end achieved. It would also be ungenerous and destructive of that fraternal feeling which alone can make an alliance effective for one ally to seek to make money out of another.

In principle, therefore, there ought to be no general taxation of the friendly visiting forces, their arms, equipment, or operations; but this principle does not preclude taxation of those forces which is in the nature of payment for goods or services received by them, as, for example, a municipal water tax. Neither does it prevent the taxation of the individuals composing those forces in respect of their private and unofficial activities, as, for example, collection of a sales tax upon a purchase made by an allied soldier in a shop in the town where he is billeted, provided there is no discrimination against him.

There is another line of reasoning which leads to the same conclusion. Chief Justice Marshall in his opinion in the case of *The Exchange* enumerated three classes of persons entitled to immunity from the jurisdiction of the local sovereign: (1), friendly foreign sovereigns; (2), ambassadors and ministers; and (3), friendly foreign armed forces invited or permitted to enter another country. It is well settled that real property purchased by a foreign sovereign or nation and occupied by its embassy or legation and

[10] Paris, 1927, p. 115.

personal property used by the ambassador or minister in performing his duties are exempt from all local taxation, except a tax which is a payment for goods or services rendered, such as water-rates.[11] Marshall makes no distinction among the three classes of persons listed by him as entitled to exemption from local jurisdiction. If, therefore, as has been shown to be the case, property officially used in the course of their duties by members of the second class of persons listed by the Chief Justice namely ambassadors and ministers, is exempt from taxation; then logically the same exemption should extend to property officially used by the third class, namely friendly foreign forces.

Let us pass from text writers and discussions of principle to actual occurrences and see whether and to what extent visiting armed forces have in fact been taxed.

For many years the United States, with the consent of the Japanese Government, maintained a hospital at Yokohama, Japan, for the service of its naval personnel in Asiatic waters, staffed by the Medical Department of our Navy and guarded by United States Marines. In 1900 the chief of the local revenue bureau left blank income tax returns at the hospital, and later sent postal cards to the personnel on duty requesting them to fill out the forms. The surgeon commanding the hospital took up the matter with the United States minister at Tokio and the latter took the matter up with the Japanese Foreign Office, with the result that the Japanese Treasury Department "decided not to press the matter of the return of incomes."[12]

In 1906 provisions were sent to Newfoundland, apparently as a commercial shipment by a merchant vessel, for delivery to and consumption on board a United States revenue cutter. The next year a shipment of uniform clothing was sent for the like purpose. In 1925 machinery was shipped to China for incorporation in river gunboats being built for the United States Navy in a Chinese shipyard. In each case the question arose whether the goods in question were subject to duty and in each that question was decided in the negative. It is not clear whether the decisions were based upon the view that goods intended for a friendly foreign public vessel were exempt from tax or on the theory that the goods never entered the country levying the import tax.[13]

[11] Lawrence, Principles of International Law, 7th ed., p. 294; Pitt Cobbett, Leading Cases on International Law, Vol. I, p. 318; Foster, Practice of Diplomacy, p. 171; Feller and Hudson, Diplomatic and Consular Laws and Regulations, Vol. II, p. 1348; act of December 24, 1942, 56 Stat. 1089; letter from the Assessor of the District of Columbia to one of the authors; Reference re Tax on Foreign Legations [1943], 2 Dominion L.R. 481. The opinion by Chief Justice Duff of the Supreme Court of Canada in the case last cited is so encyclopaedic in its citation of authority and so convincing in its reasoning as to make it unnecessary, with respect to this point, to do more than to refer to it.

[12] Foreign Relations of the United States, 1900, p. 762 *et seq.;* Moore, Digest of International Law, Vol. II, 62.

[13] Hackworth, *op. cit.*, Vol. II, pp. 414, 415.

The experience of the American Expeditionary Forces in World War I furnishes numerous examples pertinent to the present discussion. The American military authorities stood on the principle that the associated countries in which our Army served should not enrich their treasuries by the taxation of our operations. This claim was recognized by the French Government in the following declaration by M. Klotz, Minister of Finance, in a letter of November 28, 1918:[14]

> "I have the honor to inform you that, agreeably to the desire thus expressed, I find that it is possible to exempt from stamp and registration and all other duties and taxes collected for the profit of the State by the *Administration de l'Enregistrement* all acts and transactions performed in France for the exclusive service of the American Army and the four organizations—Red Cross, Y.M.C.A., Knights of Columbus, and Salvation Army—associated with it.
>
> "As to direct imposts collected by the *Administration des Contributions directes*, existing legislation assures a complete exemption to the allied Armies and in particular to the American Army and the four organizations associated with it."

By the application of this principle the customs duties were not collected on imports for military use; leases of buildings by the Army were free from the tax on leases; checks drawn by disbursing officers did not bear the stamp tax; wine purchased for the use of American troops did not bear the duties which would otherwise have been levied; and, of especial interest, General Orders No. 34, Headquarters Services of Supply, American Expeditionary Forces, July 31, 1918, announced that:

> "The French Government has granted exemption from the 10% luxury tax and 0.20% tax to the American Army, the American Red Cross, the Y.M.C.A., the Knights of Columbus, and the Salvation Army for supplies bought for the exclusive use of the American E.F. or for assistance to the French population."

French port dues are thus discussed in the Final Report of the United States Liquidation Commission to the Secretary of War:[15]

> "The French proposed that we pay commercial rates, minus certain exemptions for vessels carrying military personnel and munitions. The total charges calculated on this basis would have been approximately 4,825,000 francs. This plan was rejected by us.
>
> "The water level had been raised at St. Nazaire, practically for our sole benefit, and at French expense. On the other hand, we had put in docking facilities at numerous ports which had been used by the French and others as well as by our vessels. After a series of negotiations, the French agreed to allow a reduction of 50 per cent from commercial rates at Bordeaux and 40 per cent at all other ports. The fees were calculated on this basis, and finally the French agreed to accept a lump-sum payment of 3,000,000 francs to cover dues for the entries of all vessels of the

[14] In the files of the War Department. Translation supplied.

[15] Government Printing Office, 1920, pp. 70–72.

United States or vessels serving the United States between April 6, 1917, and the complete evacuation of France by American forces. The contract was signed October 1, 1919.

"It covered (a) port dues or tonnage dues, which are entry charges based on tonnage of ships, tonnage of cargoes, and the number of passengers landed; (b) the raising of water level; and (c) dredging operations. There were excepted from the terms of the contract such special charges as (a) pilot's fees; (b) fees for the use of cranes, hangars, lighters, warehouses, railroad trackage, etc.; (c) bills for coal, water, light, and other supplies; (d) repairs; (e) trimming charges; and (f) port sanitary inspection and hospital fees."

What was in fact done appears to have been in substance a recognition of both the main principle which the present writers maintain is applicable to the problem, that one nation may not tax the armed forces of another in the former's territory, and the exception to it, namely, a tax which is in substance a payment for services rendered.

During the same period there was a complete waiver of port and towing fees between the French and Italian Governments at certain ports of the two countries.[16]

Let us next consider the position of the United States as to what has been and is the liability to taxation of friendly foreign forces in this country.

During World War I the British ambassador at Washington requested that British military personnel and freight be exempted from taxes on transportation. The Treasury Department informed the Department of State, and the latter informed the British ambassador, that

"the Treasury Department has no discretion in the administration of such a taxing measure, but is obliged to see to it that such taxes are collected, and under these circumstances the Secretary of the Treasury has no authority to take any steps with a view to according preferential treatment to British military personnel and stores on account of preferential privileges having been accorded United States troops and freight in Great Britain."[17]

The Department of State made a similar answer to a like request by the chargé d'affaires of Czechoslovakia.[18] The present writers can not help regretting that, if the Treasury Department thought the language of the statute so strict as to prevent it from making any exception in favor of the armed forces of nations associated with us in war, this department or the Department of State did not lay before Congress the reasons why such an exception ought to be made.

Later, in another case, the Treasury Department adopted a more liberal ruling. In 1924 the Argentine Government bought in the United States

[16] *Journal officiel*, Mar. 18–19, 1917, quoted in 45 *Journal du Droit International Privé* 871 (1918).

[17] Hackworth, *op. cit.*, Vol. II, p. 407.

[18] *Ibid.*, p. 408.

steamship tickets for certain personnel of the Argentine Navy returning to their own country. The United States Treasury Department decided that the tax on foreign passage tickets need not be paid.[19]

In a still later case, not involving taxation of military forces, the Chinese Legation in 1933 asked that the Chinese Government Agency in New York be exempted from the federal tax on cablegrams, telegrams, radiograms, telephone messages, bank checks, and manufacturers' sales tax. The Treasury Department ruled:[20]

> "Diplomatic representatives of foreign governments and those of the diplomatic class are the only agencies of foreign governments in the United States which are entitled to exemption from taxation as a matter of right under international law.
>
> * * *
>
> As is stated in the ruling, Congress has authorized no such exemption and in the absence of a treaty so providing there is no apparent constitutional authority on the part of this Department to establish such a policy for the government."

The present writers can not agree to the correctness of the first sentence quoted as a matter of law; and it would seem that, in writing it, the language and reasoning of Chief Justice Marshall in the case of *The Exchange,* already discussed, were overlooked. In that case Marshall named three classes of persons exempt from the jurisdiction of the sovereign in whose territory they are. Ambassadors and public ministers constitute one such class. Chief Justice Marshall makes no distinction among the three classes as to the degree or extent of immunity and no logical basis is perceived for doing so. If, therefore, the Treasury Department was right, as no doubt it was, in saying that ambassadors may not be taxed by the country to which they are accredited, even without their being expressly exempted by the statute laying the tax, it necessarily follows that friendly armed forces in another country by invitation are likewise exempt from taxation by it. For these reasons it is believed that the Treasury Department might consistently with the law have ruled otherwise in the cases of the tax upon transportation of British and Czechoslovakian military personnel and property.

In 1934 the Portuguese Legation inquired of the Department of State with respect to the facilities which the United States was prepared to extend, on a reciprocal basis, to naval vessels of Portugal visiting the United States. The Department of State made a comprehensive answer in which it was said:[21]

> ". . . that foreign naval vessels are granted free naval wharfage and tugboat facilities, if available, when requested through the Department of State, it being 'understood that the United States assumes no liability for damages incident to such use'; that naval officers arrange for a dock or anchorage, usually 'assigned without charge by the local port

[19] Hackworth, *op. cit.*, Vol. II, p. 421. [20] *Ibid.*, p. 483. [21] *Ibid.*, p. 416.

> authorities', and assist in other ways; that under section 309 of the Tariff Act of 1930 (46 Stat., pt. 1, p. 690) supplies (not including equipment) may be withdrawn from bonded warehouses free of duty or internal-revenue tax for certain classes of vessels, including naval vessels, of any nation reciprocating such privileges toward naval vessels of the United States, . . . without charge, and that necessary American consular bills of health are furnished by American consular officers without charge; that no entry fees, lighthouse dues, tonnage taxes, or port charges are collected in such cases; that towing and wharfage charges are not collected by the Government, but are made by private interests for services rendered on request of visiting war vessels; and that the Government of the United States was prepared to extend these facilities reciprocally to the Portuguese Government."

By the Internal Revenue Code the income of foreign governments from any source in the United States is exempt from the federal income tax.[22]

By joint resolution of Congress of June 27, 1942,[23] the privilege of free importation for "personal or official use" was granted to the armed forces of the United Nations, subject to withdrawal if the other nation shall not accord reciprocal treatment to our forces.

A foreign government, its agencies, and officers, are not at present required to pay Federal excise taxes, the legal incidence of which would otherwise fall upon them, in respect of official transactions for which payment is made by the foreign government. The excise taxes coming within this classification include the taxes on admissions and dues imposed under Chapter 10 of the Internal Revenue Code; the tax with respect to safe deposit boxes under Chapter 12 of the Code; the taxes with respect to telegraph, telephone, radio, and cable facilities under Subchapter B of Chapter 30 of the Code; the taxes on the transportation of persons under Subchapter C of Chapter 30 of the Code; the tax on the transportation of property under Subchapter E of Chapter 30 of the Code; the tax on the use of motor vehicles and boats under Chapter 33A of the Code; and the documentary stamp taxes relating to the issuance and transfer of shares of stock and corporate securities, and relating also to certain foreign insurance policies, passage tickets, and conveyances of realty sold, imposed under Chapters 11 and 31 of the Code. Moreover, members of the military and naval service of any of the United Nations are accorded the same benefits as men of our own services in respect of the reduction in the tax on admissions laid by 26 U. S. Code 1700 and also the complete waiver of the Federal transportation tax as to reduced-fare furlough tickets on the railroads.[24]

In at least one case a state of the Union undertook to tax foreign military or naval forces on their property. In 1934 California collected a sales tax on oil sold to a British naval vessel. The Secretary of State wrote the

[22] 26 U. S. Code 116 c.

[23] 56 Stat. 461; 50 U.S. Code, Appendix, 791.

[24] 26 U. S. Code 3469. The statements in the above paragraph are based upon a letter from the Deputy Commissioner of Internal Revenue to one of the authors.

Governor of California saying that our Government had supported the view that American war vessels are exempt from such a tax in foreign countries. The Governor in his answer pointed out that the tax was one upon the retailer rather than the purchaser but that the British government might apply to the oil company for a refund and that company in turn to the state for the like refund.[25]

Upon a review of the foregoing instances when this Government has stated its views or acted with respect to taxation of foreign armed forces, it will be noted that there have been some changes in its position from time to time. It is believed that in some cases it might, consistently with law, have taken a more liberal position than it did.

Local taxes upon visiting forces rest upon a somewhat different basis. Since a municipality is a creature of the state in which it is situated, as a general rule it should not tax the visiting forces except under circumstances under which the state could do so. On the other hand, many of the services which a municipality performs, such as water supply, sewerage, paving, street lighting, police and fire protection, inure to the benefit of visiting forces in the city. Indeed if a large force is quartered in or adjacent to the city, the increase in the load upon its waterworks, sewerage system, and electric plant may be very considerable and impose a substantial financial burden upon the city. It is, therefore, reasonable that the visiting force should waive the complete immunity to which it may in theory be entitled and make some payment for such service or benefits as it actually receives.

The question of municipal taxation arose during World War I in connection with the French *octroi*. That tax rested upon very special considerations rooted in history, and, while it was sometimes paid in full and sometimes compounded for, in the end it was almost universally waived, and the sums actually paid appear to have been trifling. The final report of Brigadier General (now Major General) Walter A. Bethel, Judge Advocate of the American Expeditionary Forces in France, to the Commander-in-Chief of those forces,[26] devotes a section to the subject of *octroi* dues:

> "The French Government renounced all import dues on materials imported into France by the United States for the use of our armies, but in the summer and fall of 1917 a number of cities in France made demands upon the American Army either directly or through diplomatic channels for the payment of *octroi* dues. The *octroi* is a form of municipal tax or duty which, under a law of 100 years standing, certain cities of France levy upon articles which enter them and are consumed therein. In general, foodstuffs, fuel, forage and building materials are subject to the *octroi*. The amount of the dues varies in the different cities, being regulated to some extent by the municipal authorities, though all such regulations must be approved by the central administra-

[25] Hackworth, *op. cit.*, p. 414.

[26] In the files of the War Department

tion. The purpose of the *octroi* is to meet the expenses of the city, which it does in large part, thus relieving property owners from other taxation and effecting a reduction in rentals and other costs to the general public. In view of the doubtful legality of the payment of the *octroi* dues under our own appropriation laws, it was ordered that no such dues be paid until there should be a statutory or other unquestionable authority to make the payments.

"The refusal of the United States to recognize its liability for *octroi* dues could not be satisfactory to the French municipalities by reason of any principle in the laws of the United States. Under the French law the French armies and other agencies of the French Government paid these municipal dues equally with individuals. The British Government had recognized its liability to pay them and was discharging that liability. It was but natural that the American authorities should hesitate to admit the liability of the United States in view of the exemption of our own Government from all forms of state and municipal taxation that had been derived from the principles of our constitution. It had to be recognized, however, that while the United States had no interest in some of the purposes for which *octroi* dues are levied, such as education, support of the poor, etc., our Army, nevertheless, enjoyed many public utilities which were supported by the *octroi*, such as streets, water, illumination, sanitation, and, indeed, lower rents, and indirectly many other benefits for which our Government and its personnel, though not directly taxed, support by indirect contribution in the form of higher prices at home. In principle it was, therefore, believed that the American Army should meet the demands in part for payment and the question was submitted to the Assistant Comptroller in France immediately upon his arrival, who held that the United States might legally pay the *octroi* dues from the appropriation for the transportation of our Army and its supplies.

"The determination of the exact amount of octroiable articles which our armies brought into the many cities would have required an immense amount of accounting and other administrative work. It was therefore deemed advisable to make, if possible, as the British had in many cases done, agreements with the local municipal authorities for payment at a fixed rate per man *per annum*. Amounts could then easily be determined from the morning reports of the troops. A representative of the Commander-in-Chief accordingly visited the *octroi* cities and entered into such agreements with the municipal authorities. These agreements generally provided for such rates of payment as would cause the total sum to be paid to be about one-sixth of the amount that was actually chargeable under the law. During the year 1918 and the early part of 1919 *octroi* agreements were made with many cities. The gratitude of the French people, due in large part, no doubt, to the effective participation of our forces and our assistance in driving the enemy from France, caused nearly all these towns, including Paris, to remit all *octroi* obligations of the American Army, and to refund such monies as had been paid."

It appears therefore to have been the original view of the American Expeditionary Forces that the *octroi* was a true tax which they ought not to pay. However, the *octroi* was in part a payment for services rendered; and,

furthermore, as the French army, the army of the host state, paid the *octroi* to the municipalities, it did not become the visiting army, the American Expeditionary Forces, to insist on that complete exemption to which in theory they were entitled. The agreements of which General Bethel speaks were accordingly made and constituted a solution of the problem agreeable to both parties.

The right to collect the *octroi* came up again in 1925 when the city of Cherbourg attempted to collect that tax upon food and other supplies put on board a naval vessel of the United States in its harbor. Our ambassador protested but the French Ministry of Foreign Affairs answered that such vessels are exempt by way of customary courtesy, and not as a matter of jurisdiction. The Department of State directed the ambassador to protest further but it does not appear what was the outcome of the affair.[27]

A question also arose concerning the taxation of certain lands in the Borough of Brooklyn, City of New York, occupied by the French Republic as a depot for the storage and shipment of military supplies during and after the War. From some time in 1917 the French Government held the property under lease. On March 27, 1918, the former owner and the French Republic made an executory contract of sale. On September 11, 1918, the property was conveyed by the former owner to the Newtown Creek Realty Corporation, a New York corporation formed by the French Republic for the purpose and of which it owned all the stock. The taxes appear not to have been paid for several years and in 1925 the French Republic and the Newtown Creek Realty Corporation brought an action in the New York courts against the City of New York to cancel the assessments as clouds on the title, contending that by international comity the territorial jurisdiction was waived with respect to such property and that hence it was exempt from taxation. The action was tried at a Special Term of the Supreme Court of New York before Justice Riegelmann, who held himself limited to the exemptions expressly granted in the tax laws of the state and decided in favor of the city. He said:[28]

> "The rule is familiar that diplomatic agents are absolutely immune from allegiance to the state to which they are accredited; that they are not subject to its laws and that their persons are inviolable. These immunities have been declared by statutes in the United States. The privilege of immunity carried with it an exemption from taxation of the personalty of an ambassador and the property belonging to him, or the property of his sovereign, and applies to the premises occupied by him as his residence or for the purpose of transacting his governmental business, but the exemption to ambassadors or to foreign states does not seem to have been extended beyond such privileges. . . ."

We can not agree with all that the learned judge said, although his decision may be right. He might well have rested it, as a strict matter of law, on

[27] Hackworth, *op. cit.*, Vol. II, p. 413.

[28] *French Republic v. City of New York*, N. Y. Law Journal, Dec. 30, 1925, p. 1279.

the fact that the record title was in a domestic corporation, and have disregarded as irrelevant the ownership of the stock. An appeal was taken to the Appellate Division which was never decided for reasons which will appear. Presumably upon the representations of the French Government that the state should implement its obligation under international law, the legislature of New York on April 30, 1926, enacted chapter 708, Laws of 1926, which authorized the board of supervisors of any county or the chief financial board of any city in its discretion to "exempt from taxation for local purposes, real property belonging to a foreign government recognized by the United States of America in the prosecution of the late war with Germany, or belonging to a corporation, the entire capital stock of which is owned by or on behalf of such government, and used by it in connection with the storage, shipment, or disposal of materials . . . for use in the prosecution of such war, while so owned and used after April the sixth, nineteen hundred and seventeen." Sec. 2 of the same act provided for exemption of such property from state taxation, and limited the duration of the exemption to December 1, 1926. Pursuant to that act and to an opinion of the Corporation Counsel of the City of New York dated July 16, 1930, addressed to the Board of Estimate and Apportionment, that board exempted the property in question from taxes.[29] The above case may not be, in the strictest sense, one of the taxation of the operations of a friendly foreign force, since it does not appear that there were any French troops at the depot in Brooklyn at any time; and, if there were, they were almost certainly withdrawn long before 1926. The result was that the French Government obtained full exemption from taxation.

In 1935 the Government of Ecuador purchased at New York a vessel intended for use in its Navy. The question arose as to collection of a sales tax imposed by municipal ordinance. The Department of State thus addressed the city authorities: [30]

> "The question as to whether the sale would be taxable would depend upon whether the tax is one imposed upon the Ecuadoran Government or upon the vendor of the property. It is well settled in international law that the public property of foreign governments is not amenable to the local jurisdiction for tax purposes. If, on the other hand, the tax is imposed upon the seller of the property and is merely passed on to the foreign government as part of the purchase price, immunity from the tax could hardly be claimed by the foreign government. Taxes imposed by the Federal Government on cables, telegrams, transportation tickets and similar services are not assessed against official messages of foreign governments and transportation tickets purchased by their diplomatic representatives in the United States.
>
> "While there is no treaty between the United States and Ecuador bearing on the subject it is hoped nevertheless that the City of New

[29] The foregoing statement is based upon a letter and inclosures kindly sent one of the authors by the Comptroller of the City of New York.

[30] Hackworth, *op. cit.*, p. 415.

York may see its way clear to relieve the Ecuadoran Government of payment of the tax."

The city waived the tax.

In many instances of the presence of troops in a friendly foreign country the matter of taxation has been dealt with by treaty. In practically all the historical examples which have been examined the agreements have em bodied the principle already stated, namely that the host country shall not enrich itself at the expense of its ally. This was true as far back as the restoration of the Bourbon kings in France and Spain following the overthrow of Napoleon. By a convention of February 9, 1824, France undertook temporarily to garrison Spain. The Spanish king, in the preamble to the treaty, declared that, "in order to consolidate his government in such a manner as to restrain . . . the factions which have been seeking to disturb it," he finds it necessary to ask that the French army remain for a time in Spain. The article recognizing immunity to taxation ran as follows:[31]

> "Articles of apparel and equipment, food stuffs and other objects necessary for the consumption or use of the French troops, shall enter and be transported in Spain free of all duties. But to prevent abuses which might prevent the maintenance of customs requirements, it is agreed that these objects shall not be introduced except with authentic certificates stating their origin and destination, and in conformity to formalities to be determined."

The qualification in the sentence last quoted is no more than a reasonable one, and, as will be seen, is found in other agreements.

In the treaty of 1903 with Cuba providing for the lease by the United States of a naval station at Guantanamo, it was provided:[32]

> "Materials of all kinds, merchandise, stores and munitions of war imported into said areas for exclusive use and consumption therein, shall not be subject to payment of customs duties nor any other fees or charges and the vessels which may carry same shall not be subject to payment of port, tonnage, anchorage or other fees, except in case said vessels shall be discharged without the limits of said areas; and said vessels shall not be discharged without the limits of said areas otherwise than through a regular port of entry of the Republic of Cuba when both cargo and vessel shall be subject to all Cuban Customs laws and regulations and payment of corresponding duties and fees.
>
> "It is further agreed that such materials, merchandise, stores and munitions of war shall not be transported from said areas into Cuban Territory."

The treaty with the Republic of Panama of 1903 is not primarily concerned with the presence of visiting armed forces, but with the construction of the Panama Canal. It does, however, in Article XXIII, expressly

[31] Translation supplied. Martens, *Nouveau Recueil de Traités*, Vol. 6, p. 397, at p. 401.

[32] Malloy, Treaties, Conventions, etc. between the United States and Other Powers, Vol. I, p. 361.

authorize the employment of the land or naval forces of the United States for the protection of the canal. In Articles X and XIII there is carved out a tax exemption large enough to include every aspect of American governmental activity: [33]

"Article X.

"The Republic of Panama agrees that there shall not be imposed any taxes, national, municipal, departmental, or of any other class, upon the Canal, the railways and auxiliary works, tugs and other vessels employed in the service of the Canal, store houses, work shops, offices, quarters for laborers, factories of all kinds, warehouses, wharves, machinery and other works, property, and effects appertaining to the Canal or railroad and auxiliary works, or their officers or employees, situated within the cities of Panama and Colon, and that there shall not be imposed contributions or charges of a personal character of any kind upon officers, employees, laborers, and other individuals in the service of the Canal and railroad and auxiliary works.

* * *

"Article XIII.

"The United States may import at any time into the said zone and auxiliary lands, free of custom duties, imposts, taxes, or other charges, and without any restrictions, any and all vessels, dredges, engines, cars, machinery, tools, explosives, materials, supplies, and other articles necessary and convenient in the construction, maintenance, operation, sanitation and protection of the Canal and auxiliary works, and all provisions, medicines, clothing, supplies and other things necessary and convenient for the officers, employees, workmen and laborers in the service and employ of the United States and for their families. If any such articles are disposed of for use outside of the zone and auxiliary lands granted to the United States and within the territory of the Republic, they shall be subject to the same import or other duties as like articles imported under the laws of the Republic of Panama."

The treaty of 1914 between the United States and Nicaragua for the future construction of a canal by the former country across the latter, though not primarily concerned with the presence of our forces in Nicaragua, authorized the construction of a naval base by the United States on the Gulf of Fonseca. That treaty provided in Article I that the canal should be "forever free from all taxation or other public charge." [34]

Since the close of World War I the American Battle Monuments Commission has carried on extended activities abroad, particularly in France, in which connection questions of foreign taxation have had to be considered. On August 29, 1927, the United States and France entered into an Agreement for the Acquisition of Sites for Monuments which, in Article VII, makes the following provision for tax exemption: [35]

[33] Malloy, *op. cit.*, Vol. II, p. 1353.

[34] Treaties, Conventions, etc., between the United States and other Powers, Vol. III, p. 2741.

[35] *Ibid.*, Vol. IV, p. 4179; Treaty Series No. 757.

"The land acquired in conformity with the provisions of this agreement will be exempted from all rates and taxes in conformity with Articles 105 and 106 of the Law of 3 Frimaire, An VII and with the Decree of August 11, 1808.

"By application of the provisions of Article 12 of the Finance Law of June 30, 1923, exemption will be granted from all taxes for stamps, registration, or mortgages, etc., for the various documents established and conveyances accomplished by the French Government having in view the acquisition or the concession of land necessary for the erection of the memorials in question."

The French courts recognized that the Commission was an agency of the United States and, as such, exempt from their jurisdiction.[36]

The question of taxation also arose in consequence of the presence of British troops in Irak. By the financial agreement of March 25, 1924,[37] concluded between the two countries after British recognition of the independence of Irak, it was provided (in Article 14) that Irak should exempt from import or export duties all articles for the official use of the imperial and other forces or services maintained in Irak at the expense of his Britannic majesty's Government, all articles imported by or consigned to any official canteen for his Britannic majesty's forces, all personal effects introduced on arrival in Irak by members of such forces, and all articles addressed to individual members or recognized messes of his Britannic majesty's forces on production of a certificate that they are for the use of the individual or mess concerned. By Article 15 the Government of Irak agreed not to levy any tax on the forces or services of his Britannic majesty's Government in respect of offices, buildings, land, or premises occupied by such forces or services for official purposes.

As is well known, after the present war began, but before the United States became a belligerent, by exchange of diplomatic notes of September 2, 1940, in return for the cession of fifty destroyers, the United States obtained from Great Britain the right to lease naval and air bases in Newfoundland, Bermuda, the Bahamas, Antigua, Jamaica, St. Lucia, Trinidad, and British Guiana. The agreement made between Great Britain and the United States with respect to the use and operation of those bases, which has been published in full in this JOURNAL,[38] has elaborate provisions concerning taxation. Article XI (2) provides that public vessels of the United States shall not be subject to compulsory pilotage or to light or harbor dues, but that if a pilot is taken pilotage shall be paid. Article XII (2) says that there shall be no tax or fee for registration or licensing of any motor vehicle

[36] *Lahalle et Levard c. American Battle Monuments Commission, Cour de Paris, 1re Ch.*, Feb. 28, 1936, in 32 *Revue Critique de Droit International* 484 (1937); Hackworth, *op. cit.*, Vol. II, p. 471.

[37] Great Britain, Treaty Series, 1925, No. 17.

[38] Vol. 35, Supp. p. 134; H. Rep. Doc. 158, 77th Cong., 1st Sess.; Dept. of State, Executive Agreement Series, No. 235.

of the Government of the United States. Article XIV, nearly a page in length, forbids in the broadest terms the imposition of any "import, excise, consumption or other tax, duty, or impost" on material, equipment, supplies or goods for the United States or a contractor at the base; or for use aboard a United States public vessel; or consigned to a post exchange, ship's service store, commissary, or service club, or for sale thereat to members of the United States forces or civilian employees; or upon the belongings or effects of members of the United States forces, contractors, civilian employees, or their families. Article XVII forbids the levying of income or poll tax upon members of the United States forces or civilian employees in the colonies, or upon profits derived by a person in the United States from a contract for the construction or operation of one of the bases. It will be seen that the fullest exemption from taxation of all sorts is allowed, not only to the United States and its military personnel, but also to civil employees of the Government and contractors and their employees.

One striking feature of the present global war is the number and variety of the contracts between co-belligerents. One government has air power, but needs a flying field on the territory of an associated nation. One has natural resources essential to the operations of another. The lend-lease legislation has made familiar the recognition that the defense of a foreign state may be necessary to the defense of the United States. It has resulted that, in instances far too numerous to be catalogued here, one government has been permitted to come upon the territory of another to carry on activities for their joint advantage. With these instances have come a host of agreements and understandings as to immunity from local taxation. Some of these are more or less formal agreements, others informal arrangements. As full information is not available as to some of the countries in which our troops are now serving, a complete statement of the arrangements in each can not now be made. Furthermore, such a statement, even as to those countries from which reports as to the tax situation have been received, would extend this article unduly. In general and subject to some exceptions, usually not of much importance, the personnel, property, and operations of our forces are not being taxed. The authors will limit themselves to giving a summary of the situation in some of the countries in which our troops are serving.

In Great Britain and Northern Ireland no customs duties are levied on goods imported through usual official channels for the armed forces of the United States or for contractors with the United States. Port and wharf facilities are furnished free. Real property, the occupancy of which is needed by the United States, is obtained for us by requisition by the British Government. The owner then ceases to be liable for local rates, but the British War Office pays a gratuity to the local government in lieu of rates. Most of the supplies and other personal property locally obtained for our forces are procured under "reverse lend-lease," that is, they are furnished by

the British Government without any payment in money. But in cases when cash purchases are made, the following arrangement prevails:[39]

> "Finance Officers and Purchasing and Contracting Officers are informed that the War Department has approved the payment of the British Purchase Tax as such for purchases made by the U. S. Army with the proviso that the tax be refunded by the British Government."

The procedure is to forward each quarter to the British Treasury a claim for refund of the purchase tax, supported by the invoices on which the tax was paid. This amounts in substance to complete exemption. United States military and naval personnel and American civilians brought to Great Britain by our forces are exempt from the British income tax, but British civilians employed by our forces pay it. No estate or inheritance tax is levied on the property of deceased military or naval personnel of the United States. Official checks drawn by finance officers and paymasters of our forces are exempt from the twopenny stamp tax. Our military and naval personnel are liable to the usual purchase and stamp taxes on unofficial transactions.

The Governments of the United States and of Canada have created a Permanent Joint Board on Defense, upon whose recommendation numerous and varied activities are being carried on by United States Army Forces in Canada. Among these is the construction of the Alaska military highway. This project was undertaken on the basis of an exchange of notes of March 17 and 18, 1942. The Canadian Government thereby agreed on its part:[40]

* * *

> "(B) to waive import duties, transit or similar charges on shipments originating in the United States and to be transported over the highway to Alaska, or originating in Alaska and to be transported over the highway to the United States;
>
> "(C) to waive import duties, sales taxes, license fees or other similar charges on all equipment and supplies to be used in the construction or maintenance of the road by the United States and on personal effects of the construction personnel;
>
> "(D) to remit income tax on the income of persons (including corporations) resident in the United States who are employed on the construction or maintenance of the highway."

From time to time other projects have been undertaken, and in each case the terms of the agreement with respect to the Alaska highway have been adopted. Thus the United States, in order to procure oil from a Canadian field, contracted with a Canadian corporation to provide the necessary equipment and to purchase the total flow. Canada has an extraction tax on oil wells which, in final analysis, falls not upon the purchaser but upon the producer as a charge for the permission to extract. Nevertheless the Canadian Government has agreed to remit during the war royalties on oil

[39] Principles and Procedures for Local Procurement in the United Kingdom.. Issued Dec. 31, 1942, by the Commanding General, S.O.S., U. S. Army Forces in Great Britain.

[40] State Department Press Release No. 109, Mar. 18, 1942.

production, and income tax on persons and corporations resident in the United States who are employed on the construction or maintenance of the project. Canadian customs duties, moreover, are not applied to packages sent unofficially to members of the United States Army Forces for their personal use. This last is a gracious and generous concession by Canada which goes further than the United States could ask on principle. The conclusion to be derived from all this experience is that the two Governments recognize that it would be inconsistent with the fundamental principles of joint defense for one Government to impose a tax upon operations which the other is carrying on for their mutual advantage.

The question also arose as to provincial and municipal taxation of the United States forces in Canada and their operations. A constitutional question was raised, as the British North America Act allows considerable autonomy to the provinces, though not so much as our states enjoy. The matter was settled by an exchange of diplomatic notes between the Department of External Affairs of Canada and our Minister to that country, dated August 6 and 9, 1943.[41]

The Canadian note, to which our Government agreed, said:

> "In the view of the Canadian Government the United States Government itself cannot be effectively taxed by Provincial or municipal authorities."

The sentence quoted would seem to be an acknowledgment by the Canadian Government of the soundness of the position taken in the present article that one friendly government may not be taxed by another. Having in mind the autonomous character of the provinces, the Dominion Government in its note went on:

> "If in any instance an attempt is made by those authorities to tax the United States Government either in respect of real property which it owns or of which it is a lessee, or in respect of license fees on motor vehicles owned by the United States Government, the Canadian Government will intervene in the legal proceedings and request the Court to accord appropriate immunities. Should the Court hold, contrary to the expectations of the Canadian Government, that the United States Government is legally liable to pay such taxes or license fees, the Canadian Government will, as a contribution to the general costs of the defence projects, reimburse the United States Government for any Provincial or municipal taxes levied in respect of such projects which the United States Government had been held liable to pay and had paid."

In another paragraph the note said that contractors with the United States are bound to pay municipal taxes and fees, but continued:

> "The Canadian Government will undertake to refund to the United States Government any amounts which that Government may pay to United States contractors in respect of this taxation. Any such pay-

[41] Both notes are printed in full in Executive Agreement Series 339, Department of State.

ments made by the Canadian Government will form part of its contribution to the cost of the defense projects."

The note further said the Canadian Government will reimburse the United States for license fees for motor vehicles employed on defense projects in Canada, and will request the provinces not to impose license fees on non-military drivers of trucks or poll taxes on non-military personnel normally resident in the United States engaged on military projects in Canada.

The Canadian Government in the above note took a position in strict accord with what these writers conceive the law to be, and in some respects went further. Nothing could be fairer or more generous than its attitude in this respect.

The conclusions deducible from the foregoing survey may be thus stated:

In principle there should be no taxation by one nation, B, of the armed forces of another, A, which are within B's borders by B's invitation or with its consent, or of their arms, equipment, supplies, or operations. This is true because such invitation or consent implies (unless expressly denied) a waiver of sovereignty over such forces, and taxation is an exercise of sovereignty. Collection of a tax by compulsory process upon the person of a member of the visiting forces, his arms or equipment, or upon the military supplies or other property in the possession of the visiting army would be wholly inadmissible, because such compulsion would interfere with the performance of the duties to discharge which that force was permitted to enter the host country. Furthermore the invitation to the visiting force, or the consent to its presence, is usually given by the host state to further its own national policy; and it would be illogical and contrary to its own interest to lay a burden upon the means whereby that policy is carried out. The principle, however, does not preclude a tax which is a payment for services received, nor does it prevent non-discriminatory taxation of individual members of the visiting forces in respect of their unofficial activities. In nearly all instances in which the taxation of visiting forces has been regulated by treaty or agreement, they have been completely exempted. In the absence of express agreement, it can not be said that there is a uniform and consistent body of authority definitely and clearly holding the visiting forces to be exempt from taxation by the host state; but there is considerable authority to that effect. For reasons set out in detail earlier in this paper and summarized in the first part of this paragraph, they should on principle be exempt. As a practical matter, for one ally to seek to enrich itself by taxing another's soldiers or sailors would be destructive of that fraternal feeling which is indispensable to the success of allied military operations. Allies will, therefore, advance the great object in which they are all engaged, of winning the war, by refraining from any attempt to tax each other's armed forces.

EDITORIAL COMMENT

"THE INTERNATIONAL LAW OF THE FUTURE"

"For the second time in a single generation most of the peoples of the world have become engaged in a World War. The fact offers an insistent challenge to the intelligence of mankind. . . . The spirit of man cries out for a better way of life. . . . A special responsibility would seem to rest on the legal profession, and particularly on members of the legal profession who have had experience in international law."

With this thought in mind a number of Americans and Canadians actively interested in international law have engaged in discussions during the past two years on "the International Law of the Future." The resulting statement [1] is a significant contribution to current thinking. At a time when, in so many countries, men working in the field of international law find themselves unable to speak out about the future, when some of them are languishing in prison camps and some are silenced for other reasons, when indeed so many periodicals devoted to international law have been forced to suspend publication—at such a time the appearance of this statement is an enheartening event.

The statement is not the product of a lone scholar, working in the seclusion of his study. Some two-hundred men were engaged in the discussions, which were held in various centers of North America. A series of exploratory meetings was followed by several series of meetings devoted to successive drafts. Some thirty conferences were held, and sixty-two hard-working days were devoted to them. That a variety of opinions was taken into account is evidenced by the fact that the participants included judges, lawyers, professors, government officials and men of special international experience. One hundred and forty-five of the participants are named in a foreword to the statement, but the community of views presented is not to be taken to reflect the individual views of any particular person.

Lines which might be followed in "revitalizing and strengthening international law" [2] are set forth in the form of Postulates, Principles, and Proposals, each of which is explained in a comment which reviews the history of the past and assays the needs of the future.

THE POSTULATES

Under the rubric of Postulates the statement sets forth what are deemed to be the essentials of a legal order in a world of States. The Postulates, six

[1] The text is published in the Supplement to this number of the JOURNAL, below, p. 41.

[2] The quotation is from the declaration on Fundamental Principles of International Policy, made by the Government of the United States of America and approved by numerous other Governments in 1937. See this JOURNAL, Vol. 31 (1937), p. 688.

in number, serve to indicate the starting points, the premises, or the assumptions on which the later Principles and Proposals are based.

The central conception is that of a Community of States, for which effective organization is required. International Law is the law of this Community of States, and its development depends upon continuous collaboration by States. The conduct of each State in its relations with other States is subject to international law, and the sovereignty of a State is subject to the limitations of international law. Any failure by a State to carry out its obligations under international law, or any use of force or any threat to use force by a State in its relations with another State, is a matter of concern to the Community of States. The maintenance of peaceful relations between States requires orderly procedures by which international situations may be re-adjusted as need arises.

THE PRINCIPLES

The statement proposes that a declaration be promulgated to serve as the basis of the international law of the future, and ten Principles are presented as the substance of the proposed declaration. Such declarations made in the past have tended to emphasize the legal rights of States; these Principles enounce the legal duties of States living together as good neighbors in an organized Community of States. Some of the Principles are statements of existing law, but some of them would call for extensions of the present law.

The Principles would require, first of all, that each State must keep its own house in order. It must carry out its obligations under international law in full good faith, and it cannot excuse its failure to perform this duty by invoking limitations created by itself in its own constitution or laws. It must see that conditions do not prevail in its territory which menace international peace and order, and to this end it must treat its own population in a way which does not shock the conscience of mankind. On the other hand, recognition is given to the necessity of each State's being free to live its own life, and hence each State must refrain from intervention in the internal affairs of any other State, and it must prevent the organization within its territory of activities calculated to foment civil strife in the territory of any other State. Interposition by the Community of States itself is distinguished from intervention by a single State.

The Principles then affirm the duty of each State to take part in the organization of the Community of States. It must coöperate in establishing agencies for dealing with matters of concern to the Community, and collaborate in their work. It must employ only pacific means in seeking to settle its disputes with other States, and when no settlement can be reached by other pacific means it must accept settlement by the competent agency of the Community of States.

The Principles would have it declared as a legal duty of each State to refrain from any use of force or any threat to use force in its relations with

another State, except as authorized by the competent agency of the Community of States. Though the statement recognizes that a State may use force to oppose an unauthorized use of force against it by another State, it would make this exercise of the right of self-defense subject to immediate reference to and approval by the Community of States. The comment offers the explanation that "the plea of self-defense has been greatly overworked" in the past, and that "in many cases it has been merely specious. In modern times the psychology of peoples has been such that every war has seemed to all the peoples engaged to be a war of self-defense."

As corollaries of the ban on the use of force it is proposed that each State have a duty to take such measures as may be prescribed by the competent agency of the Community of States for preventing or suppressing a use of force by any State, and to conform to limitations prescribed by such an agency with respect to the size and type of its armaments.

Finally the statement affirms a duty of each State to refrain from entering into treaties inconsistent with its duties under general international law.

THE PROPOSALS

To implement the suggested declaration as to the duties of States the statement presents twenty-three Proposals which might be followed for an effective organization of the Community of States. The Proposals are not in the form of a draft of treaty provisions. They forecast not the solutions to be given to the various problems but the agencies and methods and procedures by which solutions are to be sought.

Sixteen Proposals are made concerning the organization of the Community of States on a universal basis and it is suggested that no provision should be made for the expulsion or withdrawal of any State. The organization of the Community of States would thus be coëxtensive with the applicability of international law. It is assumed that at the conclusion of the present war the lodgment of power will be such that the States which desire an effective organization will have the dominant voice, and that other States will be willing, or will feel themselves constrained, to follow the lead. Regional organizations would be possible within the general framework.

A General Assembly is proposed, in which all States should be entitled to representation, and the decisions of which might as a general rule be taken by majority vote. Alongside the General Assembly would be a smaller body or Executive Council, for representation in which States would be chosen with reference to the importance of their roles in international affairs, and for the decisions of which unanimity would generally be required. Broad powers are suggested for the two bodies with respect to the maintenance of peace, including power to make provisions for preventing or suppressing the use of force, and power to modify general rules of international law. Subject to their direction, also, special agencies are suggested for promoting coöperation in various fields. The continuance of various existing organizations is

proposed, particularly the Permanent Court of International Justice, the Permanent Court of Arbitration, the International Labor Organization, the Universal Postal Union and the International Telecommunication Union. Various of these bodies would be served by a General Secretariat. The comment reviews as to each function the experience of the League of Nations, the Union of American States, and other bodies, and numerous departures are suggested to take advantage of the teachings of that experience.

Two Proposals are devoted to the settlement of international disputes, obligatory jurisdiction over all legal disputes being proposed for the Permanent Court of International Justice, and power to take cognizance of and decide any dispute not pending before the Court being proposed for the Executive Council.

Five Proposals deal with treaties and peaceful change, limited powers being proposed for the General Assembly, the Executive Council, and the the Permanent Court of International Justice. Finally, it is suggested that it should be possible to amend the international instrument creating the organization of the Community of States without the necessity of unanimity.

The result of thorough investigation and prolonged discussion, the statement merits careful consideration by those who will be the architects of the "general international organization" forecast by the Moscow Declaration of October 30, 1943. No more important unofficial contribution to thought upon the subject has been made in any country in recent years.

MANLEY O. HUDSON

RESERVED INTERNATIONAL RIGHTS

The basic rights of the independence and sovereignty of nations naturally imply corresponding obligations. These obligations are due not only from one nation to another but from all to each. Such rights do not depend solely on the power of any nation to protect itself. There exists a collective community interest that forbids either national self-help or intervention by one nation in the affairs of another.

This collective interest implies a supreme law which, in spite of the lack of effective sanctions, has its own justification and validity. It amounts virtually to a reserved right which no nation may exercise by itself alone.

No nation is free to do as it pleases either within or without its own borders. Violation of the rights of individuals or of states may vitally affect the interests of all nations. A kind of constitutional international law is gradually emerging that defines the rights and obligations of each and every nation. If a nation demands respect for its basic rights it is obligated to respect certain reserved rights vested in the international community.

The main principle involved in the protection of the collective interests of nations may be formulated somewhat as follows. *The international community reserves to itself the protection of rights essential to the safety and the welfare*

of all. The independence and sovereignty of nations is limited by, and is subordinate to, the general interest of the international community. This general international reserved right includes the following:

I. International Security. The present war has become a war in defence of collective security. When it is successfully ended permanent guarantees must be established by the victorious nations, with the adherence of any other nations prepared to assume their international obligations. How this shall be achieved remains an unsolved problem calling for the highest kind of statesmanship.

II. The Collective Welfare of Nations. This includes such matters as public health, essential raw materials, the migration of individuals—namely the unemployed, stateless persons, and criminals,—standards of labor, and relief work. These and other cognate matters are gradually receiving recognition as of collective interest and concern. The Atlantic Charter is evidence of this fact.

III. Freedom of the Seas. The slave trade and piracy have already been recognized as subject to international action. The use of strategic bases, straits, canals, and other inland waterways will become of increasing importance to the whole international community.

IV. Freedom of the Air. There is general recognition of the fact that international aviation, when peace is established, must not be left to the arbitrary control of separate nations. It has become in a spectacular way a collective interest which concerns international security as well as the peaceful intercourse of peoples.

This general principle of reserved international rights finds especial significance when applied to the so-called right of "self-determination" of peoples. The slogan, which finds too easy acceptance, that "no people are fit to govern another people," when critically analyzed, is seen to be superficial, false, and even dangerous in its implications. It has been unjustly used to disparage the achievements of such colonial nations as Great Britain, The Netherlands, and France, not forgetting that the United States also has its colonial responsibilities. The term "imperialism" has come to have a loose and unfair connotation of ruthless exploitation and tyranny that is unwarranted by the facts. Whatever the abuses of "imperialism" may have been in remote times, it may fairly be claimed that colonial administrations, with rare exceptions, have rendered immeasurable service to the subject peoples and to civilization in general. The proud assertion that the British Empire has been "the greatest school for self-government ever created" is well founded. Witness the experiences of the American Colonies, and the British Dominions, not excluding India, whose vaunted "national self-consciousness" has emerged under British tutelage.

The sweeping assumption that all peoples are fit to govern themselves and to control their territories and resources in an exclusive manner is based on an inadequate understanding of the great problem of colonial administration.

To imply that the more advanced and privileged peoples have no obligations towards the backward peoples of Africa, the Pacific Islands, Malaya, and India, is as unrealistic as it is cynical.

The principle of a general reserved international right has special significance with respect to strategic territories and resources. The possession of such lands and raw materials is now being recognized as a collective trust, not only for the peoples immediately concerned, but for the entire world community. The exploitation of dependencies, without due regard for the needs and interests of other nations, is rightly to be condemned. There exists the superior claim of international welfare and security. The doctrine of international trusteeship, whether of colonies, mandates, or of national domains, is gradually becoming recognized.

Any strategic base for trade, aviation, military or naval use, is to be held subject to the needs of the whole family of nations. No selfish, exclusive claims may be permitted to endanger the rightful interests of other nations. The Republic of Colombia never had the sole right to control the natural international highway across the Isthmus of Panama. Nor had the United States the right to claim that the Panama Canal should be for its own exclusive use. The Hay-Paundefort Treaty of 1901 was an eloquent tribute to this reserved international right. So likewise the Suez Canal belongs neither to Egypt nor to Great Britain; it is an international highway.

Hawaii, Hong Kong, Singapore, Gibraltar, and other strategic bases, are all outposts for the service and the defence of all peoples. Australia and New Zealand have discovered in the course of the present war that their own security is directly involved in the fate of India. Such bases will have immense significance in plans for postwar organization and security.

The doctrine of reserved international rights need not imply the violation of any of the basic rights of nations. On the contrary, as in the case of the American Constitution, it should prove to be the supreme guarantee of all liberties, whether national or individual. While various races are emerging from barbarism and feudalism, the community of nations must exercise a collective responsibility for the welfare and safety of all. In some instances this responsibility may have to be assumed by certain of the older nations, such as Great Britain, The Netherlands, France, Belgium, Portugal, and the United States, acting in behalf of the community of nations for the good of all.

The clear recognition of the principle of reserved international rights should help greatly to clarify the thinking of critics of colonial administration. Failure to do so can only lead to confused counsels and unwise decisions. It is a principle deserving much more serious consideration than it has heretofore received. The publicists would do well to lay less stress on the basic rights of nations and to emphasize the reserved international rights.

PHILIP MARSHALL BROWN

LOOKING BACK ON WAR

War is not a new status. The laws of war have often been strained in times of earlier hostilities. Ayala, in 1581, said, "For no matter how careful we wish to be no more can laws without arms than arms without laws and discipline protect a state however flourishing." Gentilis, a few years later, in 1588, gave an accepted definition of war as "a properly conducted contest of armed public forces." Almost a hundred years later Vattel, whose ideas widely influenced early American thought, stated, "War is a condition in which a state pursues its rights by force." Dr. Lieber, who, in 1863, drafted the Instructions for the Government of the Armies of the United States in the Field, a code which has formed the basis for many subsequent regulations, wrote: "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde, together, in peace and in war." The military object of war was to secure the submission of the enemy with the least possible loss of life and property, and the limit of justifiable action was determined by commensurate military advantage.

G. G. W.

FLAWS IN POST-WAR PEACE PLANS

The Connally Resolution, the Moscow Declaration,[1] and private resolutions like that of the Committee on International Law of the New York State Bar Association [2] envision the prospective peace as a new *status quo* to be enforced upon recalcitrant nations by an "international authority" "maintained" by "free and sovereign nations," or "a general international organization based on the principle of the sovereign equality of all peace-loving states . . . for the maintenance of international peace and security." It thus seems likely that the punitive theory of "peace enforcement" will again be tried, as against the more profound effort to deal with war as a disease having causes and symptoms which must be treated with psychological understanding by a concert of nations looking not for "criminal" nations but for that physical distress which evokes demands for change. It seems rather a pity that the failures of the "hue and cry" theory, palpable since 1919, and, as we shall try to show, inevitable, invite not discouragement but repetiton. The Carthaginian peace contemplated by the *London Economist* will require much force to maintain it, but this ought not to be confused with a real peace, or with useful international coöperation, or with an international organization of any kind.[3] Before the consequences of coercion as

[1] This JOURNAL, Vol. 38, Supplement, pp. 2–3.

[2] Report, January 21 and 22, 1944.

[3] See London Economist, March 2, 1944, as quoted in New York Times, March 3, 1944, p. 2, and War Secretary Grigg's statement on enforcing peace, *ibid.* *Cf.* W. D. Herridge (former Canadian Minister to the United States), *Which Kind of Revolution?*, Boston, 1943, p. 23: "Versailles was not a treaty of peace but a declaration of war."

an instrument of international policy are recognized universally, further damage will have been done to international relations and domestic well-being.

The sources of the errors which have produced this punitive theory of international relations are not difficult to trace. The first is the assumption that international law is like municipal law, that its weakness lies in its lack of enforcement, and that if we could only devise some agency to enforce it, we should not only strengthen law but achieve peace. The New York Bar Association Committee in its Report says:

> The law of nations has been largely primitive law in the sense that it has had no sufficient force of the community of nations behind it. Such force must be provided if international law is to effectively govern the relations of the nations between themselves. This is now promised by the action of these great nations . . . [p. 4]
>
> . . . That a permanent organization of the nations be established for the purpose of maintaining peace by legal sanctions and the suppression of aggressive war. . . . [p. 7]

The kind of peace to be made seems not, if the Committee's Report is a criterion, to have any bearing on the necessity or effectiveness of enforcement, although that point is crucial.

It is a fundamental error to assume that international law is primitive because it lacks force and that an enforcing agency would cure the ills incident to international relations. It cannot be too often stressed that conceptions of municipal law can never be applied to international law because the subject matter, individuals on the one hand and sovereign nations on the other, differ fundamentally. Hence the societal form of association and the applicability and utility of coercion, must also differ. Individuals can be coerced by a centralized superior and, in spite of occasional revolutions, can not legally or usually physically resist societal agents. Sovereign nations can not have, or be coerced by, any centralized superior because they are legally equal, and no nation, as Story said, is the *custos morum* or the policeman of the others.[4] Any law that prevails among equals cannot be decreed or enforced by a superior and must be of a type quite different from that which prevails within the State.[5] The two are law on different levels, which fact induced Austin to call international law international morality. That was a recognition of their essential difference. If there were a superior, it would not be international law; and so long as states are legally equal, as the recent resolutions admit, there can be no superior authority. Force behind an international organization, independent of that of particular states, is unthinkable so long as the members are sovereign states,[6] and would soon prove fatal to the organization. It must derive its prestige from different methods—

[4] *United States* v. *La Jeune Eugenie*, Cir. Ct., 2 Mason 409 (1822).

[5] Edwin Borchard, "The Relation Between 'State' and 'Law'" (1926–27), 36 Yale L. J. 767, 1086.

[6] *Cf.* Charles Seymour, "Versailles in Perspective" (Oct. 1943), 19 Va. Q. Rev. 481, 497.

consultative, deliberative, recommendatory, peaceful. The men who founded this nation seemed to have a clear grasp of that elementary human fact in discussing the suggested enforcement of the federal Constitution on the states.[7]

International law through the ages made its appeal not by force but by persuasion and application in practice. A force system among independent entities is of necessity a coalition war system. Its mere existence forecloses security and proves the absence of security. The difficulties of influencing sovereign nations to observe moderation and rules are great enough without introducing an incongruous factor like "enforcement," which is out of place among sovereign nations. Aside from promoting fear, distrust, armament, it will operate centrifugally to drive the nations apart. That is already happening, in spite of financial dependence, in the field of war criminals, invalidation of property transfers, and United States relations with South America. The international legal system is primitive not because it lacks force but because it deals with sovereign states, among whom law can have only a limited application. It ratifies and legalizes the results of war, making the results of force the rule of law. International law is to be found in approved practice or voluntary treaty assent, which has only a slight counterpart in municipal law. But the attempt to over-legalize politics can never be successful; it may break down the limited control now exerted by international law. The Anglo-American lawyer seems unable to conceive of a collection of rules as constituting "law" unless there is a state or enforcer behind it; continental jurists have no such difficulty. International law is one of those disciplines whose rules are normative not punitive,[8] applied in practice, not enforced or enforcible by coercion.

The philosophy of identifying the preservation of peace with the maintenance of the *status quo* and then hounding the non-conformist has, however, consequences which are equally disastrous. A good physician attempts first to establish the nature of his patient, his constitution, his allergies, his habits, his weaknesses. The physician's therapeutics will be fashioned to harmonize with the natural tendencies of the patient. But by prescribing the use or threat of force against a nation that finds the *status quo* intolerable, the international physicians are going against the grain. Independent national entities do not naturally have the same political objectives, internal or external, and are likely to drift into a balance of power—where there is political interest—and not unity. Coercion or its threat promotes disunity. Such a device as compulsion to observe a *status quo*—whether called "peace" or "international law"—while politically comprehensible, has as a conciliator or pacifier no roots in legal experience, and, if employed against a nation in

[7] *Coercion of States: In Federal Unions*, by Harrop Freeman and Theodore Paullin, Philadelphia, 1943; to be followed by a study of coercion in international organizations, by Mr. Freeman.

[8] "The Relation Between 'State' and 'Law'" (1926–27), 36 Yale L. J. 1, 757, 1039.

possession of arms or capable of resisting, is likely to have unhappy results. International relations are of a type which cannot be mechanized or coerced. Especially is this so if peace treaties are drawn, like many European treaties, not to reflect prevailing political trends, heal wounds and restore the lost equilibrium, but to impose conditions that are unnatural. In an industrial age they tend to produce social diseases, peculiarly cancerous in their virulence. The resulting epidemic may infect victor and vanquished alike. Hence a study of history and psychology is a more important asset than a knowledge of law or political mechanics. It is perhaps trite to remark that the coming peace treaties will be vital to the survival of western civilization. The emphasis on enforcement gives it a misplaced role in the drama.

But the philosophy of identifying peace with the *status quo* has other results. It is responsible for muddying intellectual clarity [9] and the thread of history. To it we owe such chameleonic conceptions as the opprobrious epithet "aggressor," of uncertain meaning, but applied selectively to those particular disturbers of the *status quo* whom the dominant states happen to dislike.[10] It is responsible for the conception that by remaining out of wars, when the dominant states are in, the neutral is in some way guilty of immorality. It thus promotes the spread of wars. The veneration of the *status quo*, backed by coercion, motivates the practice of intervention, now common to many nations, in spite of the lip-service occasionally paid to non-intervention.[11] It is responsible for the doctrine of non-recognition of political facts, however inexorable, if unwelcome to the ruling nation, thus affording a new means of intervention, with its incentive to war. It is responsible

[9] Thomas Baty correctly makes "certainty" one of the four canons of international law. (Baty, *Canons of International Law*, London, 1930.) Of "certainty" he says (pp. 27–28):

> And the rule must be certain. To cast doubt or questioning on an established rule of International Law is to go far to destroy it. Deriving its force from the common belief of a multitude of heterogeneous elements, the Law of Nations contains an element of weakness, due to the fact that this common belief is exceedingly difficult to create and to prove. International Law cannot bear novel theories and subtle questionings. Harmless as these may be in the sphere of municipal law, where they dash their waves with a pleasing splash against the solid rocks of daily practice, they are infinitely mischievous in the realm of International Law, where intercourse is sparse and rudimentary, and where the common understanding, so painfully created and established, rests to a great extent on accepted theories. All the efforts of the jurist ought to be devoted to reinforcing this basis of understanding, as the engineer reinforces a dyke against the sea. To wreck it is to bring chaos in again. It is the inevitable tendency of the academic mind to seek credit by advancing spectacular innovations. When we are dealing with the Law of Nations, such a course is fatal. It does not introduce, as in other sciences, a pleasantly piquant corrective to established notions;—in so far as it is effective, it destroys the subject-matter of the science which it pretends to advance.

[10] The anti-legal nature of the new conceptions has been discussed in an editorial in this JOURNAL, "War, Neutrality and Non-Belligerency," Vol. 35, p. 618 (Oct. 1941).

[11] Assistant Secretary of State A. A. Berle in address, November 23, 1943, printed in the Department of State Bulletin, November 27, 1943, pp. 384–388: "Nor have we any intention to scrap the well-settled policy of non-intervention in the affairs of other states. The policy of non-intervention in other people's affairs is and must be the first principle of sound doctrine. Unless this is the settled practice of nations, there may be no principle of sovereign equality among peace-loving states and probably no permanent peace at all."

for the doctrine of sanctions, designed to bend nations to the will of the ruling group and carrying behind it a whole flood of evils, a device never heretofore dreamed of by statesmen really believing in peace. It is responsible for that rigidity and inflexibility of diplomacy, spiced by invective, which regards every proposal to alter the *status quo* as *prima facie* intolerable, though there is no exit in peaceful change.[12] That inflexibility is likely to be associated with self-righteousness, calculated to evoke both desperation and desperate men. As an incident to discountenancing neutrality—which over the centuries had demonstrated its utility—it introduced into the language such ambiguous conceptions as "non-belligerency," which seems to justify violations of neutrality (*i.e.*, law) while purporting to escape the risks of war and legal liability. Thus, the confusion of peace with war, which at least the traditional law had sought to distinguish clearly, is now accompanied by a whole conglomeration of ambiguities, like "international police force," "just war," "concern"—the jargon of "collective security"—which have made political life very uncertain and hardly encourage hope of a profitable coöperation, an end much to be desired.

By possibly broadening the gap between the so-called "haves" and the "have-nots," by subjecting the small states to an ever greater degree of dependence on the large, by depreciating the legal rights of the small states,[13] statesmen have brought power complications into the international structure without promoting any corresponding hope of tranquillity. The equality of states, on which the small states pitifully insist, has been gravely impaired by the new doctrinal fashions.[14] By concentrating power in the hands of three dominant nations, a step perhaps leading to regional leadership, they may have made any wider international organization difficult.[15] Thus, the centralized agency whose supposed impartial decisions are to be "enforced" by the theoretical community, is in fact replaced by the few ruling states whose decisions are to be "enforced" by themselves upon the others. The whole conception of "enforcing peace," whether in its pristine theoretical purity or in its practical corruption, is at war with the fundamental facts of international life and with the theory of international law and relations.

Mr. Henry Fraser, a distinguished member of the Syracuse bar and long a member of this Society, has demonstrated his acumen and understanding by

[12] *Cf.* the remarks of Sir Eyre Crowe in his famous memorandum of January 1, 1907, Gooch and Temperley, *British Documents on the Origins of the War, 1898–1914*, Vol. III, p. 397 at 417: "Further, it would be neither just nor politic to ignore the claims to a healthy expansion which a vigorous and growing country . . . has a natural right to assert in the field of legitimate endeavour. The frank recognition of this right has never been grudged or refused by England to any foreign country."

[13] Arnold Wolfers, "In Defense of the Small Countries," Yale Review, Vol. 33, pp. 201–220.

[14] *Cf.* Baty, *International Law*, New York, 1909, p. 18: "Consequently, to restrict the equality of states to such 'legal' rights as the major states in the exercise of their supposed 'political' rights may think fit to concede, is to abolish the equality of sovereignty which at present subsists, and virtually to abolish the sovereignty of small states altogether."

[15] *Cf.* Sumner Welles in New York Herald-Tribune, December 1, 1943.

dissenting as follows from the "enforcement" provisions of the resolution of the Committee on International Law of the New York State Bar Association:

> "2. The report and resolution rest upon acceptance of the argument that respect for international law must be compelled by force. But it has not yet been demonstrated how the use of force against a nation which does not agree as to the content or application of the law will contribute either to respect for law or to maintenance of peace.
>
> "3. Nor has it been demonstrated how aggression is to be defined, or how the international force is to be applied when there is dissent among the nations which are members of the organization.
>
> "4. Nor has it been demonstrated how the creation of what would be a Roman 'peace' can be made compatible with national sovereignty and independence.
>
> "5. Nor has anyone ventured to say what attitude the United States should take if outvoted in the international organization and if confronted with the application of force against it.
>
> "In conclusion, may I urge that respect for international law does not necessarily call for international sanctions up to war itself. The opposite result might frequently follow the use of force. Before turning to premature schemes of world organization based upon brute force, I would humbly suggest that we cease from the search for bad nations and reflect that perhaps more could be accomplished by genuine and patient efforts to ameliorate the economic, social, and psychological conditions leading to strife among the nations. Some *bona fide* efforts in these directions, after peace has been restored, might, I submit, contribute much to guaranteeing the continuance of peace." [16]

The one chance of climbing out of the feckless rut unintentionally envisioned by the resolutions under discussion, it is submitted, is to make a workable and viable peace, economic and political, and

(1) to eschew as incompatible the use or threat of force by any international organization to be established, thus avoiding the sanctification of the *status quo*, and so help and not hinder the growth of fruitful coöperation;

(2) to confine attention to those economic problems, like food, oil and other raw materials, transport, communications, trade barriers, currency stabilization, credits, and loans and investments, which lie close to the national lifeline; subjects which, because of the natural community of interest in such matters among all nations, will disclose the capacity of the latter to coöperate for constructive purposes;

(3) to postpone the question of any larger political organization until economic coöperation is established, when nations are more likely to seek it instead of having it imposed;

(4) to stop chasing the presently unachievable rainbow of "collective security,"—with its incidental paraphernalia—a process which has produced an unprecedented assault on international law and helped to make international relations well-nigh hopeless. Self-interest can be relied on to induce hesitation in embarking upon the suicidal recourse to war, if tolerable alternatives are available. No greater guaranty is now possible.

EDWIN BORCHARD

[16] Report, pp. 8–9.

CURRENT NOTES

NOTICE OF PROPOSED AMENDMENT TO THE CONSTITUTION OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The following amendment, proposed by the Executive Council will be offered for adoption at the annual meeting of the Society to be held at Washington, D. C., in the Carlton Hotel, on April 28–29, 1944. †

In view of the reduced rate of income now received from life membership fees, the Executive Council proposes that Article III, Paragraph 2, of the Constitution be amended by striking out the words "one hundred dollars" and substituting the words "two hundred dollars" so that this paragraph, as amended, would read:

> "*Life Members.* Upon payment of two hundred dollars any person eligible for annual membership may be elected by the Executive Council a life member and shall be entitled to all the privileges of annual members."

JAMES OLIVER MURDOCK,
Secretary

LONDON INTERNATIONAL LAW CONFERENCE, 1943 *

From 10 to 12 July, 1943, an International Law Conference was convened in the rooms of the Royal Society, Burlington House, Piccadilly, London, by a small Preparatory Committee to discuss and, after full consideration to express an opinion on, certain legal aspects of war and warlike operations, its prohibition and replacement by a friendly settlement of international disputes including peaceful change, and, in connection therewith, a legal system of recognition of governments in recognised countries.

The invitations to the Conference were restricted to lawyers who had made a special study of public international law, in order to express to the various governments now present in Great Britain the desirability of making a decisive break with the past and to mark the possibility of achieving a successful organization of mankind in peaceful intercourse.

For that purpose four subjects were chosen for discussion. Well-known international jurists had undertaken to act as Rapporteurs by setting out in a written report the salient points regarding the subjects with which each of them was dealing. Thereunto a questionnaire was annexed to be discussed with a small Committee of experts, who afterwards issued an amended report to be considered by the members of the Conference in full session.

The Conference was opened on Saturday morning, 10 July, 1943, by its

† See announcement of program below, p. 338.

* A brief note was published concerning this meeting in the JOURNAL for 1943 (Vol. XXXVII, p. 669). It is understood that the full report of the proceedings of the Conference will be published in the Summer at which time publication of the British Year Book of International Law is also expected to be resumed.—ED.

President, Sir Cecil J. B. Hurst, G.C.M.G., K.C.B., K.C.; Professor Henri Rolin, Professor of Law in Brussels University, was elected Vice-President, and Dr. W. R. Bisschop Hon. General Secretary.

In opening the Conference the President, in a very impressive appeal, emphasised the need for a revival of international law and its development in the present circumstances, and paid a tribute to the memory of the late General Sikorski, Nicolas Politis, James Brown Scott, and M. Rostworowski.

The first subject on the agenda was the question "How far can belligerent occupation create a valid title of acquisition of rights transferable outside the occupied country and that of the occupant." Professor A. Raestad of Norway acted as rapporteur.

This question is of special practical importance in face of the enormous scale upon which systematic looting in occupied countries has taken place by the Nazi occupants during the present war. The Rapporteur pointed out that this question should be viewed from the standpoint of international law, in order successfully to defeat the numerous machinations whereby the Axis Powers have used the circumstances in which the chances of war have placed them to base their predatory title on the national laws of the occupied countries. Only along the lines recognised by international law can such violations of customary rules be defeated.

The problem has to be envisaged of how third parties who have obtained a title should be dealt with, especially in the case of bona fide acquisitions, and how the Courts in neutral countries should approach the appeal made to them for the restoration of transferred property.

After a lively debate on Saturday morning, 10 July, and subsequent consideration by a Drafting Committee, the following resolutions and recommendations were adopted by the Conference in plenary sitting on Monday, 12 July, 1943.

Resolutions

1. The rules governing the validity in third countries of the acts of belligerent occupants and of transfers of, or dealings with, property, rights and interests of any description whatsoever derived from such acts, are rules of international law the non-observation of which entails international responsibility.

Note: In courts of third States cases may be decided according to a variety of legal considerations, but the result must be in harmony with the rules of international law, the main contents of which are set out below. The Conference has not discussed the conditions under which a third State that does not give effect to the said rules is liable to pay damages to the injured party and/or his State.

2. The occupant does not succeed, even provisionally, to the status or rights of the sovereign whom he displaces. The occupant has at most, under international law, only limited rights of jurisdiction and administration; acts in excess of these limited rights are null and void in law and are not entitled to legal recognition in any country.

Note: The conference has not discussed to what extent the powers in

international law of the Axis occupants are even more limited owing to the fact that the invasion which led up to occupation constituted a breach of the obligations of the invading Axis powers in international law, nor to what extent the illegal inception of the occupation may be an independent source of invalidity of titles derived from the acts of the occupant.

3. The rights of the occupant do not include any right to dispose of property, rights or interests for purposes other than the maintenance of public order and safety in the occupied territory. In particular, the occupant is not, in international law, vested with any power to transfer a title which will be valid outside that territory to any property, rights or interests which he purports to acquire or create or dispose of; this applies whether such property, rights or interests are those of the State or of private persons or bodies. This status of the occupant is not changed by the fact that he annexes by unilateral action the territory occupied by him.

4. The civil administration established in a country subject to belligerent occupation has no status in international law. Any rule of international law establishing the invalidity of transfers of, or dealings with, property, rights and interests effected by the occupant applies also to similar transfers and dealings carried out by any associate or agent of the occupant acting for him or in his interest.

5. Securities issued or engagements undertaken under the occupant's direction by the central administrative or other public bodies, such as note-issuing banks, municipalities, etc., cannot be made the basis of claims by parties in third countries. It will be for the lawful government after the restoration of its authority to decide what, if any, exceptions shall be made to this principle.

Securities and engagements of any corporate body which the occupant has purported to constitute, or of any corporate body, which he has authorized or compelled to act in violation or circumvention of its constitution, as established under the laws in force before the occupation, are null and void.

Any person or corporate body having issued securities or entered into engagements for purpose contrary to the law in force before the invasion, or solely in the interest of the occupant, may repudiate them after the termination of the occupation by authority of the lawful government.

6. Without prejudice to the foregoing rules, rightful ownership remains in the person who has been dispossessed of anything by outright confiscation or by any device resulting from political pressure by the occupant; the title of a party in a third country derived from the occupant or from his associates or agents is invalid.

7. A person who acquires, even in good faith, any property, rights or interests which are or have been situated in occupied territory or are the property of nationals of that country will if his acquisition of them is derived directly or indirectly from acts of the occupant or his associates or agents not acquire an internationally valid title thereto as against the true owner unless such a title is valid by the law of the occupied country as applied by the reconstituted authorities after the liberation of the country.

8. It will be for the lawful government to take steps, whether legislative or administrative in character, in order to restore any property or status wrongfully disposed of or altered by the occupant or his associates or agents; if taken within a reasonable time after the cessation of the occupation such measures are not to be deemed penal or confiscatory.

RECOMMENDATIONS

I. In countries allied with the occupying Axis Power or with any of its allies the validity or invalidity of titles acquired out of an occupied country during the occupation should be governed by the same rules as those imposed upon the Axis Power occupying that country.

II. The attention of the governments of the occupied countries is drawn to the desirability of arranging for the speedy and smooth settlement between their respective countries of claims arising out of the methods of dispossession which have been practised by the Axis Powers. In this connection, the setting up in each country of appropriate bodies working under an agreed set of rules and the constitution of arbitral tribunals might be considered.

III. The governments of occupied countries should, as soon as possible after the liberation, notify through the proper channels to interested parties in third countries a list of such creations or modifications of corporate bodies as have taken place during the occupation in violation or circumvention of existing laws and are not recognised in law, entailing the nullity of securities issued or engagements undertaken by such bodies.

The second paper which was debated concerned a subject even more subtle in character. How far would it be possible by legal means to base the recognition of new, unconstitutionally established, governments on internationally agreed conditions? Should it remain possible for any political faction to obtain superiority of power in order to exercise such power in international relations?

The Rapporteur, Professor Henri Rolin, had carefully considered in his report the desirability of differentiation between a *de facto* and a *de jure* recognition of a new government in any state. In his opinion *de facto* recognition might be given by single states, but, if any new government was desirous of a *de jure* recognition by all states it should, after having obtained recognition by some states, apply to some international authority whose decision would have a binding effect.

There was some objection to such a differentiation, which seemed somewhat artificial.

It was argued during the debate that recognition of new governments should be effected by the other countries collectively, either through the Permanent Court of International Justice or an international council and that all states should be bound by such recognition. Others—and with them the Rapporteur—were of opinion that, although such common action would be the ultimate aim, for the present the nations should proceed warily and try to obtain what seemed to be within their grasp in order that this might lead to collective action in the future.

In that sense the following rules had been drawn up which were ultimately accepted by the Conference in plenary sitting on Monday, 12 July, 1943.

WHEREAS the recognition or non-recognition of new governments by other governments, each acting freely, on its own account, and often moved by considerations of national policy, has been in the past a cause of considerable

confusion and abuse; Whereas the United Nations have declared in point 3 of the Atlantic Charter their intention to respect the right of all peoples to choose the form of their government; WHEREAS it is highly desirable that, when laying the foundations of the new post-war international organization, the United Nations should take steps for the adoption of the appropriate improvements of existing international law and practice with regard to recognition.

The Conference of International Law recommends that the United Nations and others should express their agreement to the following rules, viz:

1. Recognition of new governments, i.e. of governments having acceded to power in violation of existing national law, shall not be determined on any consideration other than the effectiveness, stability and nature of the power exercised by the government, seeking recognition, it being understood that this does not interfere with the right of any government of break-off diplomatic relations with the recognised government, or to defer the resumption of diplomatic relations for political reasons.

2. A new government which is in effective control of the administrative machinery of the State and is not put into power by or dependent upon a foreign government may be provisionally recognised as a *de facto* government if it is found desirable for the protection of the interests of other States or of their nationals or for serving the needs of international co-operation.

3. *De jure* recognition should be granted to new governments whose authority is not only effective, independent, and apparently stable, but has been acquired with the general acquiescence of the people or has been confirmed by them in the appropriate way, which in countries of modern civilization implies in normal circumstances a free election or vote by the people or their representatives.

4. Provisional recognition of a new government as a *de facto* government shall give it only the right to appoint representatives (but not envoys, such as ambassadors or ministers), and the right to conclude agreements or sign acts before judicial or other international organs for the temporary settlements of current affairs, subject to ratification by a later *de jure* government.

5. A new government to which recognition *de jure* has been granted by a certain number of governments shall be allowed to apply for general recognition before an international authority having competence for that purpose, such decision to be binding on all States.

6. Any government which is of opinion that another government has no longer the qualifications required for the legal representations of a country in international relations may apply for withdrawal of its recognition to the international authority competent for this matter, such decision to be binding on all States.

The third item on the agenda regarded the existence, basis, scope, and consequences of the prohibition of war in international law. Professor James L. Brierly of Oxford University, as Rapporteur, laid stress upon the illegality of unprovoked use of armed force without having exhausted the possibilities of submitting any interstate dispute to some form of international consideration. In that sense the difference between the legal and illegal use of armed force depends upon a procedural test and can only be made good by a system of international order designed to ensure that preponderant force be available to enforce the law.

For that purpose Professor Brierly was of the opinion that the resources

of the various nations and their willingness to honour the obligations placed upon them should be taken into consideration, so that any system of collective security should both deserve and inspire confidence.

As the interests of the various states were subject to circumstances of geographical or other conditions these circumstances should be taken into consideration when imposing duties upon them. The various covenants binding states should not be uniform but graded so as to correspond as accurately as possible to the interests of each state in the threat to peace. In that sense he advocated the creation of regional security organisations within a universal or more comprehensive coördinating organisation without being mutually exclusive. On all states should rest a minimum obligation at least to be benevolently neutral towards a state victim of aggression and those who were taking action to enforce the law. The main burden of restoring peace would fall upon those states who on account of their wider interests should be willing to assume the main burden of maintaining or restoring the peace.

Though this report was well received, in the subsequent debate a number of its critics considered that not sufficient stress had been laid on the illegal character of war and the necessity for a constructive organisation of peace which would render the protection of peace by a central authority a necessity and benevolent neutrality an anomaly.

A drafting Committee was appointed to assist the Rapporteur in revising his recommendations in accordance with the points raised in debate and to prepare for voting by the Conference.

The Committee met, but unfortunately the time limit of the Conference prevented their proposals from being considered and voted upon.

The same fate awaited the fourth item which was in the name of Dr. V. Vochoc, the Czecho-Slovakian lawyer who acted as Rapporteur on the "Settlement of International Disputes including Peaceful Change." In his carefully worked out report, Dr. Vochoc began by setting out the different character of disputes arising between States who were bound together by a federal union or between individuals within a state and disputes between states who are independent of each other and who had not politically submitted themselves to a superior authority or a majority rule in a loosely bound collective assembly. Distinctions had also to be made regarding the nature of disputes which arose between such independent states. Some of these concerned rights and rightful relations between states; others were not concerned with any legal relationship between states, but with the possibility of securing a new arrangement between them and the creation of new conditions.

It is therefore necessary to find different ways for satisfying the needs of the parties in different circumstances and a suitable solution which would prevent recourse to war. While certain questions were best dealt with legally, others required a solution which would bring about a total change and alteration of the *status quo*.

The ways of obtaining solutions ranged from diplomatic negotiations and

conciliatory procedure (mediation and conciliation) to arbitration and judicial procedure. The Rapporteur dealt with all of these in succession, especially with the progress made in the last 25 years by the creation of a Permanent Court of International Justice, the Optional Clause, the General Act of Arbitration, and many bilateral conventions, and arrived at certain conclusions which he submitted to the Conference for consideration.

These resolutions met with a good deal of criticism. Amendments were proposed to bring in the recently much vaunted rules of equity and the setting up of a court of equity. Comparison was drawn with the private legislation used in the British Parliament for regularising various interests of public bodies by legislation. When dealing with peaceful change a distinction should be drawn between a change of facts and a change of obligations, the latter being a juridical question which required a juridical solution. While the basis of the report found general acceptance, it was apparent that careful consideration was needed regarding the methods of bringing the various efforts at international settlement of interstate disputes to a satisfactory settlement by peaceful means.

A drafting committee was appointed, but, as set out above, the time limit of the Conference did not allow a discussion of their findings.

It was unanimously resolved that the Conference should stand adjourned in order at a resumption of its sittings to deal with the two remaining subjects on the agenda and to vote on any resolutions which might be prepared by the drafting committee.

W. R. BISSCHOP

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 16, 1943–FEBRUARY 15, 1944

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin *and* Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

October, 1943

5/9 CANADA—UNITED STATES. Agreed, by exchange of notes, to continue in effect until Oct. 1, 1944 the agreement of Nov. 10, 1941, for the temporary raising of the level of Lake St. Francis during low-water periods. *D. S. B.*, Jan. 29, 1944, p. 142.

November, 1943

5 MOSCOW CONFERENCE. French Committee of National Liberation announced it would not approve any arrangements concerning French relations with Germany made at a conference in which France was not represented. Text of statement: *N. Y. Times*, Nov. 6, 1943, p. 3.

5–January 17, 1944 CANADA—UNITED STATES. Effected agreement, by exchange of notes at Ottawa, regarding the construction and operation of broadcasting stations in northwestern Canada. *D. S. B.*, Jan. 29, 1944, p. 139–141.

8 GREECE (in exile). In a letter to Premier Tsouderos King George promised to reconsider his return to Greece in the light of the best interests of the country. *N. Y. Times*, Dec. 12, 1943, p. 40.

17 ARGENTINA—PARAGUAY. Signed customs union treaty at Buenos Aires. *N. Y. Times*, Nov.18, 1943, p. 12; London *Times*, Nov. 20, 1943, p. 3.

18 FRENCH COMMITTEE OF NATIONAL LIBERATION. Extended jurisdiction of the Commission d'Epuration to include all types of pro-Vichy civil servants or government employes, as well as all military personnel and professional men. Work to be complete by Jan. 31, 1944. *N. Y. Times*, Nov. 19, 1943, p. 3.

22 FRENCH COMMITTEE OF NATIONAL LIBERATION—UNITED STATES. Edwin C. Wilson appointed as United States representative to the Committee. *D. S. B.*, Nov. 27, 1943, p. 379.

22 MEXICO—UNITED STATES. Mexico made second annual payment of $2,500,000 (U. S. currency) due under the Claims Convention of Nov. 19, 1941. *D. S. B.*, Nov. 27, 1943, p. 384.

22–December 1 CAIRO CONFERENCE. Following the conference held Nov. 22–26 by Prime Minister Churchill, Generalissimo Chiang Kai-shek and President Roosevelt, a statement was issued Dec. 1, concerning future disposition of territories acquired by Japan within the last half-century. Text: *N. Y. Times*, Dec. 2, 1943, p. 3; *C. S. Monitor*, Dec. 2, 1943, p. 11; *D. S. B.*, Dec. 4, 1943, p. 393; London *Times*, Dec. 2, 1943, p. 4.

22–December 1 UNITED NATIONS RELIEF AND REHABILITATION ADMINISTRATION. 1st session of the Council met at Atlantic City. The Final Act was adopted November

29. *N. Y. Times*, Nov. 30, 1943, p. 10. Director General Lehman announced November 30 that world headquarters would be set up in Washington; a regional committee for Europe in London; and a committee for the Far East with a provisional office in Washington. Four working committees were organized. Personnel by nations: *N. Y. Times*, Dec. 1, 1943, p. 7. The final plenary session occurred December 1. *N. Y. Times*, Dec. 2, 1943, p. 16. Selected documents: U. S. *Dept. of State. Conference Series no.* 53.

25 BRAZIL—UNITED STATES. Brazilian Embassy in Washington announced issuance of a decree-law setting up a new system of payments to United States bondholders. *N. Y. Times*, Nov. 26, 1943, p. 34. Statement by Secretary Hull: *D. S. B.*, Nov. 27, 1943, p. 384.

25 ITALY (Fascist). Rome radio announced the new name will be Italian Fascist Republic. *N. Y. Times*, Nov. 26, 1943, p. 11.

27 COLOMBIA—GERMANY. The Colombian Senate approved the Foreign Minister's declaration recognizing a state of belligerency. *N. Y. Times*, Nov. 28, 1943, pp. 1, 50. Statement by Secretary of State Hull: *D. S. B.*, Nov. 27, 1943, p. 379.

28 FRENCH COMMITTEE OF NATIONAL LIBERATION—SWEDEN. Sweden appointed a representative to the French Committee. *B. I. N.*, Dec. 11, 1943, p. 1099.

28 PRIZES OF WAR. Presidential proclamation extended to India reciprocal privileges with respect to prizes captured in or brought into the territorial waters of the United States, India having already consented to like treatment for prizes of the United States *N. Y. Times*, Dec. 5, 1943, p. 24; *D. S. B.*, Dec. 11, 1943, p. 413.

28–December 1 TEHERAN CONFERENCE. Prime Minister Churchill, President Roosevelt and Premier Stalin met at Teheran and agreed upon military and political plans for the war against Germany. Text of 3-Power Declaration: *Cong. Record* (daily), Dec. 6 and 7, 1943, pp. 10430, 10447; *N. Y. Times*, Dec. 7, 1943, p. 4. Text of statement on Iran: p. 4. Texts of both documents: *D. S. B.*, Dec. 11, 1943, pp. 409–410; *Russian Embassy Information Bulletin*, Dec. 9, 1943, pp. 1–2: London *Times*, Dec. 7, 1943, pp. 3–4. Corrected text: *N. Y. Times*, Dec. 14, 1943, p. 12.

29–January 12, 1944 ALLIED ADVISORY COUNCIL FOR ITALY. Met for first regular session on Nov. 29, with Harold Macmillan, René Massigli, Robert D. Murphy and Andrey Vishinsky present. *N. Y. Times*, Nov. 30, 1943, p. 7; London *Times*, Dec. 1, 1943, p. 3. A statement of December 29 set forth the functions of the Council. *B. I. N.*, Jan. 8, 1944, p. 23–24. Jean Politis was named Greek member on Jan. 12. *N. Y. Times*, Jan. 13, 1944, p. 2.

30 ITALY. Premier Badoglio's government announced it had deprived King Victor Emmanuel of his titles of King of Albania and Emperor of Ethiopia. *N. Y. Times*, Dec. 1, 1943, p. 1.

December, 1943

1/4/16 GERMANY–SWEDEN. Sweden protested Dec. 1 over the threatened deportation of 1,000 arrested students of the Oslo University. London *Times*, Dec. 2, 1943, p. 3. Germany turned down the protest Dec. 4. *N. Y. Times*, Dec. 5, 1943, p. 6; London *Times*, Dec. 6, 1943, p. 3. A second protest was delivered on Dec. 16. *N. Y. Times*, Dec. 19, 1943, p. 21; London *Times*, Dec. 20, 1943, p. 3.

1/*January* 3, 1944 LEBANON. The Parliament voted that the Lebanese flag—red, white, red stripes with a cedar in the center—become the sole recognized flag of the land. *N. Y. Times*, Dec. 3, 1944, p. 8. French control of the customs and the tobacco monopoly was turned over to Lebanese authorities on Jan. 3. London *Times*, Jan. 4, 1944, p. 3.

2 ICELAND. Announcement was made of issuance of a statement by three of the four principal Parliamentary parties declaring their unanimous approval of the founding of a republic, not later than June 17, 1944. London *Times*, Dec. 3, 1943, p. 3.

4–5 YUGOSLAV COUNCIL OF NATIONAL LIBERATION. The Yugoslav Partisan movement announced formation of a provisional government for the territory regained from the Nazis. *N. Y. Times*, Dec. 5, 1943, pp. 1, 21; London *Times*, Dec. 8, 1943, p. 3. On December 5 King Peter at Cairo protested the formation of the Council, set up by Gen. Josip Broz (Tito) and Ivan Ribar. *N. Y. Times*, Dec. 6, 1943, p. 12; *B. I. N.*, Dec. 11, 1943, p. 1104.

The Council issued a manifesto, in which it accused the Government at Cairo of spreading lies against Marshal Tito's patriots, disclaimed responsibility for treaties, denied all rights to King Peter and barred the King from the country in wartime. *N. Y. Times*, Dec. 23, 1943, pp. 1, 9. The Government in Exile replied December 23 to attacks on its legal status. *N. Y. Times*, Dec. 24, 1943, pp. 1, 4.

4/22/*January* 26, 1944 WAR DECLARATIONS. Bolivia promulgated on December 4 a decree formally declaring war on the Axis. *D. S. B.*, Dec. 11, 1943, p. 413; London *Times*, Dec. 6, 1943, p. 4. On December 22 Colombia proclaimed a state of war. *D. S. B.*, Jan. 22, 1944, p. 108. Liberia declared war against the Axis on January 26. *D. S. B.*, Feb. 5, 1944, p. 151.

7 GREAT BRITAIN—TURKEY—UNITED STATES. Text of statement issued at Cairo relative to conference of President Roosevelt, Prime Minister Churchill, and President Inönü: *N. Y. Times*, Dec. 8, 1943, p. 3; *D. S. B.*, Dec. 11, 1943, pp. 412–413; London *Times*, Dec. 8, 1943, p. 4; *B. I. N.*, Dec. 25, 1943, pp. 1119–1120.

8 FRENCH INDO-CHINA. French National Committee issued statement that Free France would work for the defeat of the aggressor and the total liberation of all the territories of the Union of Indo-China. *B. I. N.*, Dec. 25, 1943, p. 1135.

8 MALTA. President Roosevelt visited the city of Valetta and presented a scroll saluting the inhabitants of the Island. *N. Y. Times*, Dec. 11, 1943, pp. 1, 2.

11 BALKAN NATIONS. Text of Secretary of State Hull's statement on 2d anniversary of declaration of war on United States by Bulgaria, Hungary and Rumania: *N. Y. Times*, Dec. 12, 1943, pp. 1, 41; *D. S. B.*, Dec. 11, 1943, p. 413.

12 FRENCH COMMITTEE OF NATIONAL LIBERATION. Gen. de Gaulle announced the decision of the French Committee of National Liberation to grant full rights of citizenship to French Moslems, and to increase the proportion of Moslems in local councils and public offices in Algeria. *N. Y. Times*, Dec. 13, 1943, p. 10.

12/*January* 3, 1944 CZECHOSLOVAKIA (in exile)—SOVIET RUSSIA. Signed 20-year treaty of mutual assistance at Moscow on Dec. 12. Text: *N. Y. Times*, Dec. 13, 1943, p. 14; London *Times*, Dec. 14, 1943, p. 3; *Russian Embassy. Information Bulletin* (Washington), Dec. 16, 1943, pp. 1–2; *Central European Observer* (London), Dec. 17, 1943, p. 385. A protocol provided for signature in future by a third party. The Polish Premier stated on Jan. 3 that his country would welcome an invitation to become a party to the treaty. *N. Y. Times*, Jan. 4, 1944, p. 4.

13/19 WAR CRIMES. Report of the Russian Extraordinary State Atrocity Commission placed responsibility upon 9 German officers and 1 Russian for atrocities in the Kharkov region during the German occupation. *N. Y. Times*, Dec. 14, 1943, p. 3. Four men convicted by a military court were hanged at Kharkov on December 19. *N. Y. Times*, Dec. 20, 1943, p. 1.

15 ARGENTINA—PARAGUAY. Exchanged ratifications at Buenos Aires of a commercial treaty, concluded in November, and signed this date several agreements which propose to increase commercial and cultural relations. By the terms of the most important agreement Paraguay will receive "free port" facilities in Buenos Aires. *N. Y. Times*, Dec. 16, 1943, p. 5.

15 EUROPEAN ADVISORY COUNCIL. Held its first meeting at Lancaster House, St. James's St., London. It will make no public announcements, but will study many complex political problems and serve as a clearing house for Allied information. *N. Y. Times*, Dec. 16, 1943, p. 12.

16–20 INTERNATIONAL LABOR OFFICE. Governing Body, with representatives from 14 countries, met for its 91st session in London, to prepare plans for the conference to be held in April, 1944, at Philadelphia, in which Russia will be invited to participate. *N. Y. Times*, Dec. 17 and 19, 1943, pp. 6 and 32. Foreign Secretary Eden placed Great Britain on record as favoring the I.L.O. as the body best suited to handle postwar plans. 7-point agenda for the Conference at Philadelphia: *N. Y. Times*, Dec. 21, 1943, p. 19.

17 ALLIED CONTROL COMMISSION FOR ITALY. Announced decision reducing area under control of the AMG (Allied Military Government). *N. Y. Times*, Dec. 18, 1943, p. 4.

17/*February* 8, 1944 CHINA—UNITED STATES. President Roosevelt signed a bill permitting Chinese in the U. S. A. to become naturalized, and placing China among the countries with immigration quotas. *C. S. Monitor*, Dec. 18, 1943, p. 2; *D. S. B.*, Dec. 18, 1943, p. 431; *N. Y. Times*, Dec. 18, 1943, p. 2. On February 8 President Roosevelt signed proclamation putting into effect the repeal of the Exclusion Act, and fixing a quota of 105 persons a year. *N. Y. Times*, Feb. 9, 1944, p. 3.

18 FINLAND—SWEDEN. Announced signature of a trade agreement of 6 months' duration. *N. Y. Times*, Dec. 19, 1943, p. 29.

20/24 BOLIVIA. Coup, led by Victor Paz Estenssoro, overthrew the government of Gen. Enrique Peñaranda. Maj. Gualberto Villarroel was the president of the junta which took control. It was announced that Bolivia would continue to coöperate with the United Nations and fulfill its international obligations. *N. Y. Times*, Dec. 21, 1943, pp. 1, 12; Dec. 22, 1943, pp. 1, 3. The Bolivian Nationalist Revolutionary Government of Señor Villarroel decreed Dec. 24 that the 1938 Constitution would remain in force except for minor changes, that commitments to the United Nations would be adhered to, and that a plebiscite would be held at the first opportunity. *N. Y. Times*, Dec. 25, 1943, p. 7

21–22 SPAIN—UNITED STATES. United States announced protest to Spain on the disturbance caused by two Falangists at the American consulate at Valencia. Spain apologized on Dec. 22. *N. Y. Times*, Dec. 23, 1943, p. 5; *D. S. B.*, Dec. 25, 1943, p. 451; *B. I. N.*, Jan. 8, 1944, p. 34.

22/*January* 17, 1944 UNITED NATIONS DECLARATION—COLOMBIA. Colombia announced December 22 its intention to adhere to the Declaration. *D. S. B.*, Jan. 22, 1944, p. 108. President Alfonso Lopez Pumarejo signed on Jan. 17. *N. Y. Times*, Jan. 18, 1944, p. 13.

23 SYRIA & THE LEBANON. Gen. Catroux signed an agreement with the two Governments, handing over all legislative and administrative functions, hitherto exercised by the French in their names. The agreement will become effective Jan. 1, 1944. *N. Y. Times*, Dec. 25, 1943, p. 4.

23 TIMOR. Portugal demanded immediate evacuation of Timor by Japan. London *Times*, Dec. 24, 1943, p. 4; *B. I. N.*, Jan. 8, 1944, p. 3.

24–*January* 5, 1944 RECOGNITION. Seven members of the Emergency Advisory Committee for Political Defense recommended that all American republics, except Argentina, should exchange information before recognizing any new régime instituted by force. *N. Y. Times*, Dec. 25, 1943, p. 7. On December 25 the Committee sent messages to the foreign secretaries of all American republics. *N. Y. Times*, Dec. 26, 1943, p. 23. Text: *D. S. B.*, Jan. 1, 1944, pp. 20–21. On Jan. 5 the Committee adopted a recommendation pertaining to the recognition of Bolivia. Text: *D. S. B.*, Jan. 8, 1944, pp. 28–29.

25/28 WAR CRIMES. Announcement was made Dec. 25 of a draft plan of 62 articles, drawn up by a Belgian judge, Marcel de Baer, for the establishment of an international court of 35 judges. *N. Y. Times*, Dec. 26, 1943, p. 17. The Czech member of the United Nations Commission for the Investigation of War Crimes, Dr. Bohuslav

Ecer, will present his proposal to the Commission at its meeting Jan. 4, 1944, according to announcement of December 28. *N. Y. Times*, Dec. 29, 1943, p. 4.

28 CHINA—COSTA RICA. The Congress of Costa Rica adopted a bill abolishing all restrictions against Chinese immigration, thereby making Costa Rica the first Latin American country to repeal its exclusion law against the Chinese. *N. Y. Times*, Dec. 29, 1943, p. 9.

29 BRAZIL—PORTUGAL. Signed a covenant at Lisbon to ensure "the defence, expansion, and prestige" of the Portuguese language and the control by mutual agreement of its orthography. *B. I. N.*, Jan. 8, 1944, p. 33; London *Times*, Dec. 31, 1943, p. 3.

29 ITALIAN (Fascist) RECOGNITION. Announcement by German overseas news service of Spanish recognition of the Mussolini republic. London *Times*, Dec. 30, 1943, p. 4; *B. I. N.*, Jan. 8, 1944, p. 27.

31 LIBERIA—UNITED STATES. Signed agreement at Monrovia relating to the construction of a port and port works on the coast of Liberia. *D. S. B.*, Jan. 8, 1944, pp. 38–39.

January, 1944

1 ARGENTINA. Dissolution of all political parties was decreed and Roman Catholicism was made the State religion. London *Times*, Jan. 3, 1944, p. 3.

3 MEXICO—UNITED STATES. Announcement was made that the Mexican Ambassador had presented his Government's checks in payment of the 10th annual installment and interest due under the Claims Convention of April 24, 1934. *D. S. B.*, Jan. 8, 1944, p. 29.

3–27 BOLIVIAN RECOGNITION. Argentina recognized the new Bolivian Government on Jan. 3. *N. Y. Times*, Jan. 4, 1944, pp. 1, 10. By Jan. 24, seven Latin-American countries had refused recognition. Text of United States statement: *D. S. B.*, Jan. 29, 1944, p. 132; *N. Y. Times*, Jan. 25, 1944, pp. 1, 11. Brazil announced its refusal, p. 11. Foreign Secretary Eden announced January 25 that Great Britain did not recognize the junta in Bolivia. *N. Y. Times*, Jan. 26, 1944, p. 5. On Jan. 27 El Salvador announced determination not to grant recognition. *N. Y. Times*, Jan. 28, 1944, p. 3.

4 FRENCH PROVISIONAL CONSULTATIVE ASSEMBLY. Second session opened with membership increased from 84 to 102. London *Times*, Jan. 5, 1944, p. 3. Summary of program: Jan. 3, 1944, p. 3. Basic points of the program for the reform of the state: *N. Y. Times*, Jan. 10, 1944, p. 3.

4 PORTUGAL—VATICAN. Involved in a suit before the Portuguese courts over inheritance taxation, the Vatican claiming the Concordat overruled Portuguese law. The Pope waived his right to use diplomatic channels and brought suit as a private individual. London *Times*, Jan. 5, 1944, p. 3.

4 WEST INDIAN CONFERENCES. Set up as an advisory group to the Anglo-American Caribbean Commission. *N. Y. Times*, Jan. 5, 1944, p. 3. Text of joint statement issued by the United States and Great Britain on a system of conferences, the first session of which will convene early in 1944: *D. S. B.*, Jan. 8, 1944, pp. 37–38.

5–26 POLAND (in exile)—SOVIET RUSSIA. Text of Polish statement regarding their common postwar frontier: London *Times*, Jan. 6, 1944, p. 4. Text of Russian declaration of Jan. 11: *N. Y. Times*, Jan. 12, 1944, p. 4; *Russian Embassy Information Bulletin*, Jan. 13, 1944, no. 5. On Jan. 14 the Polish Government asked the assistance of Great Britain and the United States in re-establishing diplomatic relations. Text: *N. Y. Times*, Jan. 15, 1944, pp. 1–2; *D. S. B.*, Jan. 22, 1944, p. 97. Russian broadcast of Jan. 17 stated that the Polish communiqué of Jan. 15 could "be interpreted only as rejection of the Curzon Line" as a basis for their border settlement. *N. Y. Times*, Jan. 17, 1944, p. 1. Text: *Russian Embassy Information Bulletin*, Jan. 20, 1944, p. 1. On Jan. 26 Secretary Hull stated that the United

States' offer of assistance, announced by him on Jan. 17, had been declined by Russia. *D. S. B.*, Jan. 22 and 29, 1944, pp. 96–97 and 116; *N. Y. Times*, Jan. 27, 1944, pp. 1, 3. The text of the Russian reply was not made public.

15 U. N. R. R. A.—EGYPT. Egyptian Government announced decision to participate actively in the Administration. *N. Y. Times*, Jan. 16, 1944, p. 36.

19–24 UNITED STATES—VENEZUELA. Gen. Isaías Medina Angarita, President of Venezuela, visited the United States. Addressed the Congress on January 20. Text of remarks: *Cong. Record* (daily) Jan. 20, 1944, pp. 449–451.

21 AUSTRALIA—NEW ZEALAND. Signed agreement at Canberra for a common foreign policy, designed to further the peace, welfare and good government of the Pacific region. *N. Y. Times*, Jan. 22, 1944, p. 4. Summary: Jan. 24, 1944, p. 9. Text: *Australian News & Information Bureau* [Press Release] (N. Y.) Jan. 25, 1944.

21 ICELAND—SOVIET RUSSIA. Established diplomatic relations. *N. Y. Times*, Jan. 22, 1944, p. 5.

23 AXIS POWERS—PERU. Peru ordered liquidation of all German-owned banks and other Axis property. *N. Y. Times*, Jan. 24, 1944, p. 3.

26 GREAT BRITAIN. Foreign Secretary Eden stated his Government is averse to territorial changes reached unilaterally. *N. Y. Times*, Jan. 27, 1944, p. 3.

26 POLAND (in exile)—SOVIET RUSSIA. After investigating the slaying of 11,000 Polish war prisoners in Katyn Forest, near Smolensk, in August–September, 1941, discussion of which caused a break in diplomatic relations in April, 1943, a special Soviet commission announced its conviction that the Germans had been guilty of the crime. *N. Y. Times*, Jan. 27, 1944, p. 1.

26/27 AXIS POWERS—ARGENTINA. Argentina broke off diplomatic relations with Germany and Japan. *D. S. B.*, Jan. 29, 1944, p. 116. Texts of decree and Government statement: *N. Y. Times*, Jan. 27, 1944, p. 10. On January 27 Argentina froze all merchant shipping and cut communications. *N. Y. Times*, Jan. 28, 1944, p. 8.

27 GREAT BRITAIN—MEXICO. Mexico paid $73,285 to cover annual installment of reparations on property damaged during the Mexican revolution. *N. Y. Times*, Jan. 29, 1944, p. 3.

27/31 JAPAN—UNITED STATES. A joint Army-Navy report on Japanese atrocities in the Philippines was made public Jan. 27. Text: *N. Y. Times*, Jan. 28, 1944, p. 6. On Jan. 31 the United States Department of State issued a statement and listed its representations concerning atrocities. Texts: *N. Y. Times*, Feb. 1, 1944, p. 10; *D. S. B.*, Feb. 5, 1944, pp. 145–151.

27/*February* 11 JAPAN—UNITED STATES. Department of State made public texts of two telegrams to the United States Legation at Bern for transmission to the Japanese Government, concerning abuses and neglect to which American nationals have been subjected. *N. Y. Times*, Feb. 12, 1944, p. 5.

28 GREAT BRITAIN—JAPAN. Text of Foreign Minister's report to the House of Commons on Japanese atrocities: *N. Y. Times*, Jan. 29, 1944, p. 3.

28 GREAT BRITAIN—SPAIN. Great Britain joined the United States in the stoppage of oil shipments to Spain. *N. Y. Times*, Jan. 29, 1944, p. 1.

28 SPAIN—UNITED STATES. United States suspended oil shipments from the Caribbean area to Spain. *N. Y. Times*, Jan. 29, 1944, p. 1; *D. S. B.*, Jan. 29, 1944, p. 116.

31 MARSHALL ISLANDS. Text of proclamation, signed by Adm. Chester W. Nimitz as Military Governor of the Islands: *N. Y. Times*, Feb. 5, 1944, p. 4. Facsimile: Feb. 8, 1944, p. 3. This is the first formerly Japanese-controlled territory to be lost by the Japanese Empire in this war.

February, 1944

1 SOVIET RUSSIA. Supreme Soviet adopted a proposal by the Foreign Commissar, giving the 16 individual republics the right to their own commissariats of national defense and foreign affairs, and the right to deal directly with other countries.

N. Y. Times, Feb. 2, 1944, pp. 1, 10. Text of Molotov's statement: p. 10; *Russian Embassy Information Bulletin*, Feb. 5, 1944, pp. 1–5. Text of autonomy decrees: *N. Y. Times*, Feb. 3, 1944, p. 5.

3 MEXICO—UNITED STATES. Signed a treaty for the conservation, distribution and use of the waters of the Rio Grande, Colorado and Tijuana Rivers. Summary: *D. S. B.*, Feb. 5, 1944, pp. 161–162.

3 SPANISH NEUTRALITY. Spanish Cabinet ratified a policy of complete neutrality and announced it would require the strictest conformity from its own and foreign nationals. *N. Y. Times*, Feb. 4, 1944, p. 1.

4 ARGENTINA—BULGARIA. Argentina severed diplomatic relations. *N. Y. Times*, Feb. 5, 1944, p. 3.

4 ARGENTINA—FRANCE (Vichy). Argentina severed diplomatic relations. *N. Y. Times*, Feb. 5, 1944, p. 3.

4 ARGENTINA—HUNGARY. Argentina severed diplomatic relations. *N. Y. Times*, Feb. 5, 1944, p. 3.

4 ARGENTINA—RUMANIA. Argentina severed diplomatic relations. *N. Y. Times*, Feb. 5, 1944, p. 3.

8 FINLAND—UNITED STATES. Secretary of State Hull confirmed the fact that the United States had warned Finland it would be to its advantage to quit the war as soon as possible. *N. Y. Times*, Feb. 9, 1944, p. 1.

8 FRENCH COMMITTEE OF NATIONAL LIBERATION—GREAT BRITAIN. Signed at London a financial agreement and a mutual aid agreement, the former being for the duration of the war. *N. Y. Times*, Feb. 9, 1944, p. 8.

8 ITALY—SPAIN. It was announced officially in London that Spain had freed six out of seven merchant ships. Other classes of ships are under negotiation. *N. Y. Times*, Feb. 9, 1944, p. 1.

9 GOVERNMENTS IN EXILE. Dutch, Norwegian, and Belgian governments have been advised by Great Britain and the United States that control of civil affairs in their countries will be returned to them as soon as possible after their liberation. Agreements in confirmation have been drafted and are expected to be signed soon. *N. Y. Times*, Feb. 10, 1944, pp. 1, 3.

11 ITALY. The radio at Bari broadcast a proclamation, issued by Premier Badoglio, thanking the United Nations for granting self-rule in liberated territory. Text: *N. Y. Times*, Feb. 12, 1944, p. 3.

12 AXIS POWERS—BOLIVIA. Bolivia announced expropriation of all Axis firms. *N. Y. Times*, Feb. 13, 1944, p. 30.

12 PRISONERS OF WAR. American Red Cross issued statement on its efforts since Pearl Harbor to provide relief supplies for prisoners held by Japan. Text: *N. Y. Times*, Feb. 13, 1944, p. 16.

INTERNATIONAL CONVENTIONS

BILLS OF LADING. Brussels, August 25, 1924.
Adhesion: (effective May 19, 1944)
Egypt (with reservation). Nov. 19, 1943. *D. S. B.*, Jan. 8, 1944, p. 39.

INTER-AMERICAN AUTOMOTIVE TRAFFIC. Washington, Dec. 15, 1943.
Signatures:
Bolivia, Brazil, Cuba, Dominican Republic (with reservation), Ecuador, Guatemala, Haiti, Nicaragua and Peru.
United States (with reservation). Dec. 31, 1943. *D. S. B.*, Jan. 1, 1944, p. 22.
Costa Rica. Jan. 20, 1944. *D. S. B.*, Feb. 5, 1944, p. 162.
El Salvador. Jan. 6, 1944.
Text: Convención sobre la Reglamentación del Tráfico Automotor Interamericano. Washington, Pan American Union, 1943.

INTER-AMERICAN INSTITUTE OF AGRICULTURE SCIENCES. Washington, Jan. 15, 1944.
Signatures:
United States, Costa Rica, Nicaragua and Panama. *D. S. B.*, Jan. 15, 1944, p. 90.
Cuba and Ecuador. Jan. 20, 1944. *D. S. B.*, Feb. 5, 1944, p. 162.
To come into force 3 months after the deposit of not fewer than 5 ratifications.
INTER-AMERICAN RADIOCOMMUNICATIONS CONVENTION. Havana, Dec. 13, 1937.
Adhesion:
Great Britain for Bermuda. Dec. 24, 1943. *D. S. B.*, Feb. 5, 1944, pp. 162–163.
MARITIME CONVENTIONS: (1) Collisions. (2) Salvage at Sea. Brussels, Sept. 23, 1910.
Adhesion: (effective Jan. 1, 1944)
Egypt. Nov. 19, 1943. *D. S. B.*, Jan. 8, 1944, p. 39.
NATIONALITY OF WOMEN. Montevideo, Dec. 26, 1933.
Ratification deposited:
Cuba. Dec. 15, 1943. *D. S. B.*, Jan. 8, 1944, p. 39.

JUDICIAL DECISIONS

IN RE PART CARGO EX *S.S. MONTE CONTES.* CONSERVAS CERQUEIRA LIMITADA v. H.M. PROCURATOR GENERAL.*

GREAT BRITAIN: JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Lord Atkin, Lord Thankerton, Lord Wright, Lord Porter, and Lord Merrimam, P., November 1, 1943.]

In prize law captors who have brought seized property for adjudication in the Prize Court have only to prove that there is reasonable ground for suspicion that the property is subject to be condemned, whereas claimants must establish by positive affirmative evidence their title to the property, that the facts are such that there is no cause to justify condemnation, and that the reasonable suspicion is unfounded.

The Louisiana (34 *The Times* L. R. 222, at p. 223; [1918] A. C. 461, at p. 464) referred to.

Claimants who seek to establish neutral territory as the destination of seized property are not required to go so far as to prove that it will not find its way in one manner or another into enemy territory after it has been imported into the neutral country.

The Baron Stiernblad (34 *The Times* L. R. 106; [1918] A. C. 173) referred to.

Order of the Supreme Court of Gibraltar affirmed.

This was an appeal from a judgment of the Supreme Court of Gibraltar, sitting in Prize, dated April 14, 1942, which condemned as good and lawful prize 3,428 cases of canned fish, the property of the appellants, the claimants. Greene, C. J. (Gibraltar), found that the true destination of the goods was Italy and not, as the claimants alleged, Barcelona, in Spain.

The facts appear from the judgment of the Judicial Committee.

Lord Wright, delivering the judgment of the Board, said: This is an appeal from an order of the Supreme Court of Gibraltar, Admiralty jurisdiction, in prize, condemning a part cargo of 3,428 cases of tinned fish, valued at approximately £10,000, shipped on board the Spanish steamship Monte Contes at Vigo for Barcelona. The shipment was made on November 24, 1941. On December 16, 1941, the goods were seized in Gibraltar, and on the same date a writ was issued and served on the vessel, claiming their condemnation on the ground, *inter alia*, of enemy destination. On February 25, 1942, a claim was entered on behalf of the owners of the goods, now represented by the present appellants and the underwriters, on the ground, *inter alia*, that the goods were destined for Barcelona and were not going to an enemy destination. The Court rejected the claim, and condemned the

*60 Times Law Reports 57.

goods as lawful prize on the ground that they were conditional contraband destined for an enemy country—namely, Italy.

The case is marked by a paucity of information. If it was for the Crown, as captor, to establish affirmatively that the goods were conditional contraband, it might well be that the proof was insufficient. But that is not the true position in prize law. Prize law has its own peculiar rules, as the Board recently explained in *France Fenwick Tyne and Wear Company v. Procurator General* (58 *The Times* L. R. 388; [1942] A. C. 667). These peculiar rules have been developed out of the peculiar character of the issues to be determined and of the circumstances in which they arise and come before the Court. Captors are entitled to seize property, ship or goods if there is reasonable ground for suspicion that the property is subject to be condemned. The property must be brought by captors for adjudication into the Prize Court by means of the issue and service of a writ. Persons claiming to be interested in the property may then enter appearance and file a claim. To succeed in their claim they must prove their title to the property, and establish that the facts are such that there is no cause to justify condemnation. Thus the captors must show that the case is one involving reasonable suspicion. If they do so,[1] and if no claim is made, or if the claim fails, the Court will in due course condemn the property as prize. But on the side of the claimants positive proof to the satisfaction of the Court is exacted. They have to prove that they are entitled to the release of the goods as being their property, and also that the facts are such that there is nothing which would render the property good and lawful prize. In other words, they must show by affirmative evidence that the reasonable suspicions were unfounded. That these are the two issues in such cases was stated by this Board in the judgment delivered by Lord Parker in *The Louisiana* (34 *The Times* L. R. 222, at p. 223; [1918] A. C. 461, at p. 464).

It will, then, be convenient to examine what the Crown, as captor here, alleges to constitute a case of reasonable suspicion, and, on the other hand, what facts the claimants allege, or seek to establish, in order to have the seizure set aside and the goods released. The contrast between the two sides is sometimes explained as depending on the onus of proof. In a sense that may be a true description. But more exactly the difference depends on what is the case of either side. The captor has to maintain his seizure by showing the case of reasonable suspicion in order to justify what he did. The claimant has to establish by evidence of fact his affirmative case, which he can do in a case like this by showing the precise character of the adventure, and showing that the ostensible destination is the ultimate destination. In the present case the ground of condemnation relied on is that the goods are conditional contraband, that is, are foodstuffs proceeding to an enemy destination for the use of the Italian armed forces or the Italian Government. It has not been contested that such a destination would render goods liable to be condemned. What is disputed is that there was in fact such a destina-

tion. It is not that claimants have to prove a negative, but they have to prove affirmatively what was the actual destination of the goods, and that it was such that they were not subject to the penalty of being condemned. In other words, if the Court is of opinion, as the Chief Justice at Gibraltar was, that there was reasonable cause for seizing the goods, the appellants have to prove that Barcelona was the ultimate destination of the adventure so far as they controlled or could control it. Their Lordships do not go so far as the Chief Justice when he said that the claimant must prove that the articles will not find their way in one manner or another into enemy territory after they have been imported into the neutral country. Their Lordships are not aware of any authority which would justify this statement in its full breadth. Though seizure may be justified on the ground of suspicious circumstances for which the claimant could not be held responsible, it is different with condemnation, which in general would not be ordered because of an ulterior destination in respect of which the shippers were neither responsible nor privy: *The Baron Stjernblad* (34 *The Times* L. R. 106; [1918] A. C. 173). But the decision of the Chief Justice is not affected by this point.

In their Lordships' judgment there were abundant circumstances to justify the finding of the Chief Justice that the consignment of tinned fish was subject to reasonable suspicion. In the first place, the consignment was large in quantity and value. Tinned fish is a convenient and portable foodstuff peculiarly suitable for use by armed forces in the field. It could form a valuable addition to the food resources of Italy available to the Italian Government, which could direct it to the use either of the army or civil population. Barcelona was a convenient port for shipment along the coast to Italy. In addition to this obvious ground of suspicion, the shipping documents, to which in a Prize Court the preliminary investigations are directed, were of the most suspicious character. There was no manifest and no bill of lading in respect of the goods. What is called the mate's receipt did not give the name of the consignee. It is well established that where there is a question of contraband a bill of lading "to order," or a shipping document which does not specify a consignee at the neutral port whose identity and responsibility can be investigated, is in itself a suspicious circumstance; even a named consignee may turn out to be merely a cover for an enemy agent (*The Louisiana* (*supra*)). Where, however, no consignee is named at all, the goods remain under the control of the shipper. There is then no clue as to the person by whom they will be dealt with at the neutral port, which is the ostensible destination, or in what manner they will be dealt with. In war time a prudent shipper would realize that the failure to name a consignee, whose identity and position in the neutral port can be investigated, is a defect in the ship's papers, which will normally be regarded in a Prize Court as a subject of reasonable suspicion. It is a further matter of adverse suspicion that there was no navicert for the goods. This document would normally be attached to the manifest, if there had been a mani-

fest, and even if it is not obligatory in the case of a coasting voyage such as a voyage from Vigo to Barcelona, to procure it would at least be a natural and ordinary precaution.

It is here unnecessary to rely on articles 2 and 3 of the Order in Council, Reprisals (Navicerts), German and Italian Restriction (Statutory Rules and Orders 1940, No. 1436, dated July 31, 1940), in particular article 3, subclause (1), which provides that goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, should, if not covered by a valid navicert, be deemed to have an enemy destination until the contrary is established. The Chief Justice did not found his decision on the Order in Council, nor do their Lordships. The absence, however, of a navicert, which it was admitted the vice-consul at Vigo might have given in a proper case if applied for, may fairly be regarded as in some degree a further element of suspicion. Their Lordships do not therefore need to consider questions which might be raised as to the validity and effect of the Order in Council. One further circumstance of suspicion may be mentioned—namely, the strip of paper which was wrapped round the sides of the tins. The tins themselves had printed on the metal a description of the contents in various languages, including English, Italian and others. This is not a matter which could call for comment. But the superimposed paper wrapper had a description only in Spanish and Italian. This may be taken to contemplate the probability that the tins would go to Italy. It would not in itself raise a case of reasonable suspicion, though it does also to some extent go to support the other elements which point to an Italian destination.

Their Lordships are of opinion that the various circumstances to which they have adverted constitute a very strong case of reasonable suspicion. It must now be seen how the appellants claim to show that Barcelona was not merely the ostensible but, so far as rested on the appellants, the ultimate destination of the goods. The proper witness to prove that the real object of the adventure was to send the goods to a destination other than the enemy in Italy was the responsible representative of the claimant company. He could have produced any contracts under which the goods were shipped, and correspondence with consignees or buyers or agents for disposal of the goods in Barcelona. He could have explained the circumstances which led to the shipment, the nature of the market or demand for tinned fish in Barcelona, and that such a shipment was made in the ordinary course of trade. No such person was called. No such evidence was given by anybody. The evidence which was given, that tinned fish was labelled in different languages, relates merely to a not very important aspect. In truth, there was nothing that could fairly be regarded as affirmative evidence to dissipate the suspicious character of the case, or to show that Barcelona was intended or contemplated by the appellants as the real and ultimate destination. Their Lordships therefore see nothing to justify them in differing

from the judgment of the Chief Justice condemning the cargo of 3,428 cases of tinned fish as destined for Italy and as conditional contraband. The Court is entitled to take notice that a large consignment of foodstuff such as that in question is to be regarded as calculated to increase the total war effort of Italy, whether as intended to be actually supplied to the armed forces or for feeding the civil population behind the lines. The Court can also take notice that if there is, as suggested, a Spanish decree forbidding export of contraband to Italy, such decree may be, and frequently is, subject to evasion.

Counsel for the appellants has contended that a decision against the appellants can only be based on findings of fact which go beyond the legitimate limits of judicial notice, and has relied on certain observations in *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (39 *The Times* L. R. 133; [1923] A. C. 191) to the effect that, though the Court may take judicial notice of the existence of a state of war between this country and another, it may not take judicial notice of particular facts. The argument appears to be that judicial notice could not be taken of facts such as the position of Genoa as a war base of supplies in Italy, or a practice of the Italian Government, as ruler of a totalitarian State, to take the goods for its own use or for disposal in whatever way would best help the war effort. No doubt these, and similar matters, must be considered before the Court can arrive at a case of reasonable suspicion. But, in their Lordships' opinion, these are matters of common notoriety which, as on one occasion Lord Stowell said, could be acted on by the Judge in a Prize Court. Similarly, in the *Rosalie and Betty* ((1800) 2 Ch. Rob. 343, at p. 344), Lord Stowell said, of the duty of Judges of Prize Courts, "they are not to shut their eyes to what is generally passing in the world. . . . Not to know these facts as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of the subject upon which the Court is to decide; not to consider them at all, would not be to do justice." Lord Stowell was there dealing with the various devices used to cover property of the enemy. The same may be truly predicated of the devices used to cover the conveyance of contraband to an enemy destination, particularly where the adventure involves a continuous voyage beyond the ostensible to the actual destination.

The present case strikingly illustrates how helpless a Prize Court would be but for the rules which it has developed of proceeding in the first stage on reasonable suspicion based largely on its experience of "the general nature of the subject." A shipper who made the shipping documents meagre and uninformative, and abstained from giving evidence at the trial, would get away with the goods but for the rules on which the Court acts. The analogy of the English criminal law that a man is presumed to be innocent until he is proved guilty cannot be applied in these cases for many reasons. One is that it is not a criminal offence for a neutral to carry contraband, though the goods may suffer the penalty of confiscation. Another is that Prize Courts,

for good reasons as already explained, have adopted their own rules. The claimant is not a prisoner on his trial, but a party who appears to establish his own case that the goods should be released to him. After all, the claimant who knows the true facts is the person who can dissipate the suspicion, if the circumstances are such that he can do so. If he is to succeed in his claim it is for him to satisfy the Court.

In the result, in their Lordships' judgment, the decree of the Chief Justice should be upheld and the appeal dismissed with costs. They will humbly so advise his Majesty.

BOOK REVIEWS AND NOTES

Transactions of the Grotius Society, 1942. Volume 28: "Problems of Peace and War." London: Sweet and Maxwell, 1943. Pp. xxiii, 176. 15S.

These papers (read before the Grotius Society in the year 1942), are of great interest to anyone concerned with the international law of the future. Only one paper, the first, deals with problems arising directly out of the present war. This article, by Dr. Kuratowski (formerly of Wilno), considers questions of international law presented by the operation of foreign naval, military, and air force courts in the United Kingdom. Such questions include: jurisdiction; immunities; arrest and extradition; effects of sentences from the point of view of British law.

Dr. Weis (formerly of Prague) deals with international criminal law in time of peace, and his paper should prove invaluable to those who hope to curb subversive international propaganda in the future and repress acts likely to provoke friction and war. He considers 1) crimes against peace and the common law; 2) criminal law and international conventions; 3) the Spa Convention of 1920; 4) the movement for the creation of criminal law for the protection of peace, culminating with the signature, by twelve states, of the Convention for the Creation of an International Criminal Court (December 16, 1937); 5) rules of criminal law for the protection of peace in the future; 6) criminal law and moral disarmament.

"International law and the causes of war" is the topic of a paper by Professor Goodhart (Oxford). Maintaining that the vital post-war problem is international security, the author insists that security must come before social reform, and must precede, rather than follow, disarmament. "Neither democracy, nor international socialism, nor disarmament will prevent war unless the society of nations is so organised that the danger of war is minimized" (p. 70). Security cannot be attained without 1) the acceptance of the view that all aggressive wars are criminal, and 2) the establishment of just and permanent boundaries (p. 78).

Brief notes are included of a lecture delivered to the Society by Professor Rappard (Switzerland) on the constitutional history of the Swiss Republic. The following excerpt from these notes is of particular interest:

> "The binding force always remained collective security. This seems to have worked mainly because the Swiss, being a warlike nation, were as a rule ready to fight and defend their common freedom. This has kept them out of many wars and allowed them to survive in others. *Is not the greatest danger to peace an excessive love of peace and the consequent softness and unpreparedness against aggression?*" (italics supplied) (p. 85).

No practical plan for a future world organization can afford to neglect the authoritative study by Mr. Jenks (Adviser to the International Labour Office) entitled "Some legal aspects of the financing of international institu-

tions." On the basis of long practical experience and exhaustive study Mr. Jenks offers thirty suggestions, which unfortunately cannot be reproduced here. He outlines methods for singling out distinctive sources of revenue, independent of national control, to be assigned to world bodies for the financing of their work. Other revenues may be derived from contributions, fees for services rendered, and loans, while some non-controversial activities of the world authority might be placed on an endowment basis. Many other interesting suggestions are made, notably a proposal for reserve funds to tide international institutions over any future periods of emergency (p. 125 ff.).

Approaching the subject of the future law of nations from the point of view of the psychiatrist and student of the philosophy of law, Dr. Ranyard West, author of the well-known work, *Conscience and Society,* concludes after an inquiry into the inner recesses of human nature that "only if its members have found or are given a law which will hold them against themselves, can a political community continue to exist beyond the first inevitable gust of prejudice and passion" (p. 147). States must be controlled by positive law, for otherwise they will be unable to keep their promises against their own subsequent self-interest. He suggests—a very controversial conclusion—that a beginning has been made in Triepel's doctrine of "*Vereinbarung,*" with its merging of the wills of states in a "Common Will" (p. 148).

In a final chapter the report of a special committee on the Status of Stateless Persons, introduced by Dr. Bisschop (London), is presented and is discussed. Of special importance to those interested in the international protection of individual rights is the proposal that "as a member of the world community the individual should be able to call for protection by the community" (p. 155). Even more, the individual has a right to call for protection against his own state if oppressed by the latter. "The individual cannot be left to the arbitrary power of the State to which he belongs" (p. 157). Finally, the state "becomes a part of the world community and such community assumes sovereign rights under the law of nations, leaving to the state a restricted sovereignty for municipal purposes only" (p. 155).

JOHN B. WHITTON

World Court Reports: A Collection of Judgments, Orders and Opinions of the Permanent Court of International Justice. Vol. IV (1936–1942). Edited by Manley O. Hudson. Washington: Carnegie Endowment for International Peace, 1943. Pp. xvi, 513. Indexes. $2.50.

The previous three volumes of this indispensable set of World Court Reports have already been reviewed in this JOURNAL (Vol. 33, p. 801). Volume IV follows the excellent plan and arrangement of the earlier volumes. It is appropriately dedicated "To the memory of Åke Hammarskjöld," Registrar and Judge of the Permanent Court of International Justice, "whose genius for administration and for friendship contributed to the success of the Court during sixteen years."

As in the case of the former volumes, the usefulness of Volume IV of the World Court Reports is greatly augmented by thorough and intelligent documentation which makes possible the study of the reported cases without constant and inconvenient reference to other sources. A preliminary section entitled "Instruments and Information relating to the Court, 1936–1942" contains the Revision Protocol of 1929, the amended Statute of the Court, the Rules of Court, the Declarations and Signatures relating to the Optional Clause, and the revised resolution of 1936 concerning the Court's judicial practice. It also contains lists showing the membership of the League, the Judges of the Court, and the dates of the meetings of the Court during the six-year period covered by the present volume. In addition to a table of contents and indexes, there are alphabetical, chronological, and serial tables of the cases and the parties involved. The Editor's notes and bibliographies preceding each case, which were outstanding features of the first three volumes, are continued in unabated usefulness.

The ten cases contained in the volume are legally interesting rather than internationally important so far as the questions involved are concerned, but they give ample evidence of the vitality of the Court and of the ability of its judges. The fact that the editor is also a judge of the Court who took his seat on the bench on October 8, 1936, and participated in the final decision of the then pending case, the first reported in the volume, and in all the following cases, lends added interest and authority to the work, particularly for American readers. Judge Hudson dissented in the first case in which he participated, the Pajzs, Csáky, and Esterházy case between Hungary and Yugoslavia involving an appeal from the Hungaro-Yugoslavian Mixed Arbitral Tribunal (p. 93 at pp. 143–148), in company with four other members of the Court including such distinguished judges as Anzilotti and Hammarskjöld. More than one of the dissenting judges, including Anzilotti, took occasion to note their concurrence in the views expressed by Judge Hudson. Judge Hudson dissented in three other cases and filed a separate concurring opinion in two other cases. Of special interest perhaps to lawyers are his dissenting opinions dealing with questions relating to a "preliminary objection" as against a defense going to the merits in the Panevezys-Saldutiskis Railway case between Estonia and Lithuania (p. 341 at pp. 375–379), and in the case of the Electricity Company of Sofia and Bulgaria between Belgium and Bulgaria (p. 388 at pp. 434–436).

The subject index is sufficiently detailed to be really useful. The index of persons might, it is believed, be properly expanded beyond a bare list of the pages referring to the particular person involved. At least an attempt might have been made to differentiate between really important references such, for example, as the dissenting opinion of a judge, as against a mere indication of the fact that a judge sat in a case. But where so much has been done for the convenience of the reader it seems almost ungracious even to mention this small matter.

Judge Hudson has once more made both the practitioner of international law and the teacher and scholar his debtor.

WILLIAM C. DENNIS

The Italian Conception of International Law. By Angelo Piero Sereni. New York: Columbia University Press, 1943. Pp. xii, 402. Bibliography. Index. $5.50.

This book of 402 closely printed pages is the first systematic and comprehensive account in any language of the history of international law in Italy from about 1150 A.D. to the present day.

Within the limits of a book review it is only possible to give a rough idea of the rich contents of the work and of its manner of treating the subject. The book is divided into four parts: the Italian Renaissance (1150–1559), the period of decline and foreign rule (1559–1815), the period of the struggle for Italian unity (the "Risorgimento") (1815–1870), and the period since 1870.

The Italian Renaissance, the glorious period during which Italy was in all realms of culture and civilization the leading country of Europe, is also the period of Italy's greatest contributions to the practice and theory of international law. Many principles and institutions of international law were developed first by the Italy of the Renaissance. These included the principle of the balance of power, the institution of permanent legations and consuls, the development of an ordered diplomatic service (Venice) and of the law concerning diplomatic agents, an extensive network of international treaties (concluded by the Italian city-states *inter se* and with other Christian and Moslem States), the foundation of colonial companies in the East and the inauguration of the system of "capitulations," asylum to political refugees, extradition, mediation and arbitration, granting of a minimum standard of treatment to foreigners, the beginnings of the law of prize, visit and search, prohibition of piracy, and the shaping of an international maritime law from the Capitula of Amalfi to the Consolato del Mar.

In the field of theory the very revival of the study of Roman law became of the greatest importance for international law, so largely based on Roman law, either directly, or, in the *jus naturae* period, as "*ratio scripta.*" The great Bartolus is for the whole world the father of the science of the Conflict of Laws. The same Bartolus with his doctrine of the "*civitates superiorem non recognoscentes*" laid the foundation of the doctrine of sovereignty and Machiavelli created the doctrine of "*raison d'Etat.*" Bartolus conceived the idea of the transformation of the Holy Roman Empire into the present international community, which, in consequence, is prior, not subsequent to, the coming into existence of the "sovereign States," a theory recently strongly defended by Balladore Pallieri and adhered to by Sereni. This idea of sovereignty led to the disappearance of the theological ideology of the *bellum justum,* to the modern doctrine of the *jus ad bellum* and *jus in bello,* to international law as a branch of law divorced from theology, as shown in the works of the great Alberico Gentili.

During the period of decline Italy's contributions to the practice and theory of international law were very small; only in the field of neutrality are the writings of Galiani, Lampredi, and Azuni of any importance.

During the "Risorgimento" Italy's greatest contribution was the first Italian school of international law, the "school of nationalities" (Mazzini, Mancini, later Mamiani, Fiore, and Fusinato).

In the period since 1870 Italy's greatest contribution lies equally in the field of theory: the Italian positivist school of international law, headed by the great Dionisio Anzilotti and many able followers. This school had its own evolution, as shown in the work of the Kelsen-influenced Perassi, and its critique, either by adherents of natural law, such as Del Vecchio and Salvioli, or by an equally positivist school, led by Balladore Pallieri. Out of this development arose the unified, equally strongly positivist Italian school of international law. Contrary to the Soviet Union and National-Socialist Germany, Italy has never had a fascist school of international law.

The treatment of these rich materials in this volume is excellent. The book is a mine of information and contains abundant data and a practically complete bibliography of Italian writings on international law since the Middle Ages. It analyzes thoroughly all important Italian contributions to the practice and theory of international law. It gives a full exposition and critique of Bartolus, Gentili, and many other writers. It contains an admirable account and an intensely objective critique of the "*principio di nazionalita.*" The full exposition and critique of Anzilotti, of the Italian positivist doctrine, and of its evolution is of the greatest importance. There is no room here for critical remarks, but this reviewer has already taken the position that the dualistic doctrine of international and national law, whether in the version of Anzilotti or that of Balladore Pallieri, is untenable. Anzilotti indeed, later strongly influenced by Kelsen and Verdross, often contradicts his own theory; in the Austro-German Customs Regime Case, for example, he points out that sovereignty can mean only "that the state has over it no other authority than that of international law," and thus adopts Verdross' conception of sovereignty as "*Völkerrechtsunmittelbarkeit,*" which, of course, is an expression of the monistic doctrine of the primacy of international law.

But the most important and most valuable feature of Sereni's treatment lies in the fact that he always writes as a scholar, as a true member of the Italian school with its strictly juridical approach and its clear distinction between international law and international politics. Although exiled from Italy, the author is an Italian, who deeply loves his country and certainly suffers when he thinks at Italy's present fate. But the scholar, however he may suffer as a man, as a scholar must keep his attitude of objectivity, impartiality, and neutrality toward his object. The scholar's only legitimate interest is the search for truth. And the search for truth is Sereni's guiding star. The book is a great achievement.

JOSEF L. KUNZ

Copyright Protection in the Americas under National Legislation and Inter-American Treaties. Law and Treaty Series, No. 16, Issued by the Juridical Division, Pan American Union. Washington: Pan American Union, April, 1943. Pp. 2, 89. Mimeographed.

In the preparation of this volume the Juridical Division of the Pan American Union has presented conclusive evidence of the need for study of the copyright situation in the Western Hemisphere with a view to obtaining a clarification of procedures and greater uniformity in legislation.

The twelve page introduction contributes a useful summary of the Inter-American Conventions in regard to Copyright and an account of Inter-American recommendations of the last decade that have urged specific policies in regard to the improvement of Inter-American copyright relations. Through its illustration (p. 2 f.) of the problems and costs to an individual author who tries, under the present laws, to obtain protection for any literary or artistic work in all the Republics of the Hemisphere it offers conclusive argument that simplification and uniformity of procedures in the practice of Inter-American copyright protection are greatly needed.

There is no suggestion that in view of modern methods of diffusion and communication the case may be argued for an Inter-American copyright legislative convention to be implemented by the enactment of identical laws in the signatory states. Instead, the desired simplication and uniformity are to be achieved by means of an improved Inter-American convention and accommodating reforms in the legislation of each of the 21 sovereign states. Such reforms, it is hoped, will be initiated by the states themselves after study of the copyright situation which the picture of *Copyright Protection in the Americas* presents.

The Pan American Union has already undertaken, on the basis of paragraph 2 of Resolution XXXIX of the Eighth International Conference of American States, the preparation of a Draft Convention on the Protection of Literary, Scientific, and Artistic Works to be submitted to the consideration of the Governments of the American Republics in the near future.

EDITH E. WARE

Canada in World Affairs: Two Years of War, 1939–41. Edited by R. MacGregor Dawson. New York: Oxford University Press, 1943. Pp. viii, 342. Document B. Index. $3.

The Canadian Institute of International Affairs, in its brief fifteen years of existence, has already done much to stimulate serious study of international relations. Professor Dawson's book, produced with the help of other scholars and under the auspices of the Institute, is the most authentic record of Canada's first two years of war. It is the second volume of a series begun in 1941 and concerned with surveying biennially "the forces which determine the international position and policies" of the Dominion. It is intended to help us in "assessing the circumstances which made Canada a leading belligerent against the Axis."

The work falls into three Parts: the Political Scene, the War Effort, and External Relations.

For Canadians the most profitable reading is to be found in the chapters dealing with the new and complicated problems of war-time economics. For Americans probably the unbiased account of Canada's domestic politics and of the development of her relations with the United States, Great Britain, and other countries will be found of equal value.

The topical method adopted involves much repetition, but it also enhances the value of the book as a work of reference. The obvious handicap under which the able author labors lies in the fact that he must stop short of climax or conclusion,—before the Plebiscite in home politics, and before Pearl Harbor in military events. It is therefore to be hoped that the final war-volume will review the whole story from the beginning.

In essence the political chapters reveal the recent growth of Canada in the qualities of mature nationhood, her abandonment (as reflected progressively in the Prime Minister's speeches) of her historic isolationism, her slow realization of her central position in "geopolitics," her generally happy and intimate collaboration with the Motherland, her steady integration into the North American defence and economic systems (facilitated by American "assistance magnanimously given" and by the personal friendship between President Roosevelt and Mr. Mackenzie King), and, finally, her less important relations with Japan, "Vichy" and the "Governments in Exile."

Under the pressure of war and the violent shock of the French collapse Canada's economic trend has been toward an "industrial revolution" in which the Government "has taken over the responsibility of planning and directing the entire economic life of the nation" by means of multiple controls, the techniques of which are here fully explained. The Canadian democracy has been "compelled to remodel its political and economic system in order to meet totalitarian states on terms of approximate equality." To what extent this transformation will prove temporary or permanent is the subject of growingly anxious debate among Canadian parties and classes in the opening weeks of 1944.

Part IV consists of the principal documents of the period, including Canada's War Plans, Prime Minister Mackenzie King's speech on Canadian-American Relations (November 12, 1940), the Ogdensburg Agreement, the Great Lakes-St. Lawrence Basin Agreement, the Hyde Park Declaration, and the Atlantic Charter.

S. MACK EASTMAN

The Peace We Fight For. By Hiram Motherwell. New York and London: Harper and Brothers, 1943. Pp. xii, 281. Appendix. Index. $3.00.

A delay such as has occurred in reviewing Mr. Motherwell's book constitutes a severe test for a study dealing with a period of transition and post-war problems. Few among the vast array of books belonging to this category could pass this test with equal success. The time which has elapsed since

its publication has placed its merits in a particularly favorable light. If UNRRA, which has been created in the meantime, has allayed some of the apprehensions which were very much in the foreground prior to the Atlantic City Conference of November last, Mr. Motherwell's text, written long before the idea of UNRRA crystallized, sketches the problems, dangers, and responsibilities of the first transition period with a freshness and directness which we have lost in the meantime.

Mr. Motherwell merits special commendation for his comprehension of continental European psychology, a comprehension gained in extensive travels and contacts all over Europe but especially due to an instinctive understanding of foreign mentality. Another major virtue found in his approach is his faculty of combining healthy pessimism regarding likely developments with a basic belief in the survival of positive forces, common sense, and some nuclea of integration even among the victims of the present world débacle. If one is prepared to accept at all the author's method of "creative guessing" one cannot deprive Mr. Motherwell of a front seat among the planners of a bright new world.

Motherwell's chief thesis is that Europe will, after the war, be in a very advanced state of what he calls fragmentation, extending over the fields of economics, currency, transportation, and administration, and his suggestions for the second stage, that of reconstruction, are based on this assumption. The arguments and reasons which he adduces to prove his point are presented with an unusual brilliance, sweeping the reader into a mass of constructive suggestions which are convincing to the degree to which one is prepared to accept his basic assumption.

It is obviously impossible to discuss critically in a short review Mr. Motherwell's chief theses, and even less the numerous concrete hints to the victors for the day after the collapse of Hitlerism. It must therefore suffice to make a few remarks on certain particular points.

Mr. Motherwell is particularly interested in the relief aspect of the immediate after-war period. To feed Europe will certainly be one of the most important tasks facing the United Nations. But he, and many who think like him, seem to go too far in assuming that "the craving for food in post-war Europe will be a universal emotion interpenetrating all political impulses and ideas. Get control of that and you have a people . . ." Firstly, not all the European peoples are equally starving; propaganda statements emanating from official and unofficial European sources have given a somewhat distorted picture of the actual situation. Secondly, certain experiences after the last war suggest caution in this respect. Professor Carr recently reminded us of the fact that the Slovenes in some of the territories adjoining utterly disorganized Austria voted for Austria in the Carinthian plebiscite of 1920 in spite of the fact that joining Austria at that time meant starvation whereas joining the newly created Servo-Croat state would have meant immediate access to food.

The reviewer has found one major gap in Mr. Motherwell's grand design. Continually stressing the centrifugal forces, he hardly contemplates the possibility of unifying patterns being imposed by the occupational forces, not to speak of the possibility that, in some countries at least, centralized national authorities may gain control in a surprisingly short time. Europe will be a shambles, to use one of Mr. Motherwell's favorite expressions, but there is in old established countries also a community of feeling which may shame the victors and confound the pessimists.

In foreign affairs Mr. Motherwell, writing long before the Moscow and Teheran Conferences, is unduly optimistic regarding Russia's restraint in European affairs. He assumes, for instance, that "Russia will insist on permanent free ports in the Baltic countries and on free transit of her commercial goods in both directions," without realizing that the "plebiscites" staged in 1940 constituted in the opinion of the Kremlin the last word regarding the territorial fate of these countries. He is more realistic regarding Anglo-American relations when he stresses not only the possibilities of closer Anglo-American coöperation within a "total world settlement" but also—on the other hand—the possibilities of rivalry. With most of the more realistic architects of the future he desires, but does not believe in, the possibility of a world state, a world federation, or a world agency compelling compliance with its decision. He sees in the future coöperation of Britain, America, Soviet Russia and China the only possible concrete "organizing center of a future world league."

Mr. Motherwell is an imaginative and lively writer who has carried into his new career of a writer of books and serious magazine articles some of the journalist's virtues and few of his defects. His volume stands out as one of the very few books on post-war problems that can be warmly recommended to the experts, public officials, and statesmen who are to be entrusted with the planning of tomorrow. The author remains an amateur rather than a professional, but he is a first-class amateur. The statesmen would do well to associate men of Mr. Motherwell's quality in their endeavors when they actually begin blue-printing the future—a temptation to which the author fortunately does not succumb.

EGON RANSHOFEN-WERTHEIMER

Federation: the Coming Structure of World Government. By Howard O. Eaton and others. Norman, Oklahoma: University of Oklahoma Press, 1944. Pp. xii, 234. Appendix. Index. $3.00.

The present volume offers a draft Constitution for the United Nations by Professor Howard O. Eaton and a series of articles by various authors. In a concluding chapter, Professor Cortez A. M. Ewing gives the following survey: the federal solution of the problem of security in historical perspective, discussions on the theory of federalism and on presumed impediments to the achievement of world federation; finally, reactions of statesmen (Messrs.

Wendell L. Willkie, Henry A. Wallace and T. V. Soong) to the prospect of a world state.

Out of seventeen articles, only two specifically refer to Professor Eaton's plan. One is a comment by the author, limited, however, to Money and Credit; in the other an alternative to Professor Eaton's solutions: a bi-cameral legislature (both Houses directly elected by the "citizens of the United Nations") and a parliamentary executive, is presented by Mr. G. Merle Bergman who advocates a uni-cameral body elected by the national legislatures of the Member-States and a President directly elected by the citizens among nominees of the legislature.[1]

Professor Eaton's text,—the 22d version, so the Preface tells us,—is a mature study, free from national bias. Assuming that world federation, such as visualized here, is within the realm of practical politics, would the text as it stands constitute an appropriate basis for international negotiations? Frankly, no. It is much too exclusively a projection on the world scene of Anglo-Saxon concepts and traditions, with all the peculiarities which that implies. It is first a matter of language: how would this read in French, German, Spanish? It is, however, more than a question of drafting, important as that is. This text has not yet gone through the crucible through which any text should go in order to become, as the Statute of the Permanent Court of International Justice, a fundamental law which all nations may regard as their own. In order to make it cosmopolitan, a drastic revision, a complete *mise au point* of the text would be required.

If the 15 other chapters do not contribute to the elucidation of the plan, most of them are, in themselves, of great interest; furthermore, taken as a whole they lead the reviewer to the conclusion that the students of international affairs who contributed to this volume are largely in agreement with Professor William P. Maddox when he states (p. 121) that "there can be no such thing as a federation which includes totalitarian regimes denying free political action"; as it should be obvious that good intentions are not enough, political maturity would seem essential and steadiness in the traditions of representative government, most desirable, for active participation in a federation of the kind Professor Eaton has in mind. If regimented, immature and fickle representations came to dominate, with their votes, the Assembly of the peoples, catastrophe might ensue. The conclusion of Professor Maddox's article that "a universal federation, in any approximate use of the term, is merely a distant dream" (p. 122) appears to the reviewer to

[1] As to the Legislative, it is interesting to compare these solutions with that of Dr. Arnold Brecht (European Federation; the Democratic Alternative, in Harvard Law Review 1942, p. 561). Inspired by the organization of the Diet of the Germanic Confederation, Dr. Brecht's solution combines in a uni-cameral Assembly the two principles of voting power measured by population and State equality (the latter disregarded by both Professor Eaton and Mr. Bergman). Dr. Brecht's Assembly, however, is one of representatives of governments, not of the people.

prove the need for a revised League of Nations, buttressed by federal solutions, either regional, or, if world-wide, limited to advisory bodies of representatives of the people, or to certain technical fields.

In connection with a strengthened League of Nations, Professor Pitman B. Potter's article on Sanctions, a methodical analysis by "occasion, procedure, organization, modalities and value" should be specially mentioned here; it materially contributes to the elucidation of a vital subject. This reviewer particularly appreciated the statements that "automatic sanctions in any literal sense are figments of the imagination" and that "no system should leave to the aggrieved individual State the decision to apply sanctions," statements which lead us into the heart of the world problem as it confronts us today: the primary need for compulsory jurisdiction of the Permanent Court of International Justice. When Professor Potter says that "the decision to employ sanctions" must be entrusted "to a federal[1] council or even to independent executive authorities" this reviewer takes it that he is not thinking primarily of the decision of a dispute found justifiable by the Court, but of the subsequent decision to enforce such decision if Parties fail to comply with it, also of the case of aggression or other unlawful act where no dispute existed or was submitted to arbitration or adjudication.

Another contribution which should be specially mentioned in this Journal is that of Professor Carl J. Friedrich on Rights, Liberties and Freedoms. More optimistic than Dr. Arnold Brecht (in the article mentioned above), whose freedoms for Europe appear to fall short of an European standard, Professor Friedrich looks towards free discussion and independent voting to gradually discover the principles which, "in the broadest terms" (p. 79) would be "most satisfactory to most men"; but, where Dr. Brecht insists on the indispensable judicial and executive machinery to make the freedoms live through international case law and enforcement, Professor Friedrich's attention remains concentrated on the legislative aspect.

For those who believe, with this reviewer, that the immediate importance of federal solutions is primarily European, Dr. Oscar Jaszi's vision of "an economically reconstructed (agrarian reform) and politically federated southeastern Europe under the protection of the democracies" is of vital interest.

For the student of international affairs called upon to review so stimulating a book, the temptation is great to give undue emphasis to personal reactions. When an earnest and sincere attempt is made at harnessing the forces of the world for the enhancement of international justice, human freedom, peace, culture and welfare and one feels that the potentialities for good of the nation, or group of nations, to which one belongs have been overlooked or, at least, underestimated, that temptation is particularly hard to resist. This reviewer—a citizen of one of the States of the Oslo group—will not yield to it beyond suggesting three things: the importance of the Low Countries for the historical background of representative government, federal institutions

[1] In the most general meaning of the word.

and what is commonly called a Bill of Rights; the international interest of the Swiss machinery for federal government, particularly the composition and the mode of functioning of the federal executive (Federal Council); the lessons in good government that all Far Eastern countries may derive from the example of the Dutch East Indies.

JAN HOSTIE

International Bearings of American Policy. By Albert Shaw. Baltimore: The Johns Hopkins Press, 1943. Pp. x, 492. Appendixes. Index. $3.50.

Few Americans now living have observed the international bearings of American policy as long as Dr. Albert Shaw, now in his eighty-seventh year. First as a graduate student of history and political science at the Johns Hopkins University, where he was an intimate associate of Woodrow Wilson, later an editorial writer in the Middle West, then editor for many years of the *Review of Reviews*, and close friend of Theodore Roosevelt, as he continued to be of Woodrow Wilson, Dr. Shaw has occupied for a long lifetime a front-row seat in the history of American diplomacy. Incidentally, it was he who established the Albert Shaw lectures in diplomatic history at Johns Hopkins which have produced a row of 34 monographs, many of them notable contributions to the subject. It is a singularly gracious gesture for the Johns Hopkins Press to publish this book of retrospective reflections printed in the midst of this great world crisis which the veteran editor has lived to witness, and which it is permitted to hope he may be spared to see end in a peace of righteous victory.

The volume is a series of disparate chapters on the principal international questions which have arisen during the last sixty years of American international history, interspersed with editorials by the author on many of the points in discussion, reprinted from his earlier years. The most notable chapter, and in our opinion the best written one, is an essay penned over sixty years ago, when Albert Shaw was a student at the Hopkins, and published in the *International Review* for April, 1883, on "The Growth of Internationalism." If there is a central theme to the book, it is that the growth of internationalism is a confirmed tendency of modern and particularly of contemporary times, and borne out by American policy. His parting sentence is characteristic of the whole volume: "Union lies in the conceptions and purposes of well-disposed men; and this union of minds will create its own institutions."

SAMUEL FLAGG BEMIS

Foreign Relations of the United States. Japan, 1931–1941. Vols. I, II. Issued by the United States, Department of State. Washington: Government Printing Office, 1943. Pp. xc, 947; lix, 816. Maps. Indexes. $2.25 and $1.75.

The series of documents issued by the Department of State covering our relations with Japan from the time of her Army's entry into Manchuria to

that of her Navy's attack on Pearl Harbor, from 1931 to 1941, is replete with revelations, direct and indirect. Some only corroborate facts generally known by close observers of events across the Pacific while others are new to even such students. The volumes are intended, as the brief preface says, to present a comprehensive record of the diplomatic relations between the United States and Japan "in regard to matters related to the causes of the conflict between the two countries." "It was obviously impossible to include an absolutely complete selection of even the more important of the pertinent reports coming to the Department . . . Therefore only reports of special significance have been selected." But if we have not the whole story we certainly have been given ample material to show that our government made a mighty effort to be fair and reasonable, and for what has been given we can be grateful—and also proud. There is probably no other Government but the British which would have made public so much at so early a date. The publication is testimony to a fine measure of integrity, for the papers show some of the blunders that our own Government made and also some of the honesty of the nation we now propose to bring to "unconditional surrender."

The volumes are replete with statements by the Japanese which were false, some made deliberately and some inadvertently. This was due at times to the presence of dishonest men in the Japanese Foreign Office, but not always. At other times it was due to the fact that honest Foreign Ministers and Ambassadors were themselves deceived by their Ministry for War—notably when Baron Shidehara, as honorable a man as ever held office in any government, made statements regarding the entry into Manchuria which proved to be contrary to fact. But besides the false statements there are others so straightforward that they were unmistakable in their meaning. They were clear and deliberate warnings to us of what the Japanese Government, dominated by its war Ministry, intended to do. And these show that it was not they who deluded us so much as we who deluded ourselves in refusing to believe what they stated deliberately and officially. We can hardly blame the deception all on the Japanese in view of such statements as the following, made by the Japanese Foreign Minister, Hachiro Arita, to the American Ambassador, Joseph C. Grew, and cabled by him to the State Department as far back as May 18, 1939.

> "If war were to break out in Europe—and he believes there is no immediate danger—and the United States becomes involved, the position which Russia might take might conceivably decide whether peace could be maintained between the United States and Japan."
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> . . . . .
>
> "Japan," the Minister went on, "is bound to Germany and Italy by the tie of anti-Communism and, as we deem it necessary, further strengthening of this bond is being seriously considered. But if any one should regard Japan, because she had taken such a measure, as

joining into the camp of totalitarian nations in opposition to the democratic nations, he would surely be misunderstanding the true intention of the Japanese Government. Japan is not a totalitarian, no more than a democratic, state. She has an original constitution of her own which is centered around the Imperial family, and is based on the spirit of levying [allowing?] everything to have its own proper place, surpassing all ideas of antagonism. In joining hands with Germany and Italy we have no other purposes than to combat the destructive activities of the Comintern. If the United States, not understanding the true intention of Japan on this point, should base her future policies on such misunderstanding, it would bring about a deplorable situation not only respecting the relations between the United States and Japan but also in respect of the peace of the world."

. . . . . .

"National defense," said the Minister, "has an economic as well as a military aspect. The United States is well equipped in both respects; however, while Japan has an army and navy strong enough to meet any military threat, her economic defense is inadequate; and she cannot enjoy a sense of security until the deficiencies in the latter respect have been made good."

The Minister on his own intitiative then turned to the subject of the so-called "South Sea advance" and made to me the following confidential oral statement:

"We understand that, since the military occupation of Hainan Island by Japan and the placing of the Sinnan Gunto (Spratly Islands) under the jurisdiction of the Formosan Government General, rumors have spread giving the impression as though Japan entertained some territorial designs toward the South Seas; that as a result certain interested countries are apprehensive, and that even some Americans have a similar apprehension with regard to the Philippines. The Japanese Government consider it regrettable from the standpoint of Japanese-American friendship that such apprehension has been aroused. They are, therefore, prepared, if the United States Government should desire that some step be taken by the Japanese Government for the purpose of dispelling such apprehension, to enter into conversation with the United States Government."

An uninformed man might have taken this last paragraph to mean that the Japanese Government was willing to discuss with the American the whole "South Sea advance," but Ambassador Grew was no such man. He knew that Japanese naval men were advocating this and that all Arita was proposing to discuss was the security of the Philippines, which the Japanese would be glad to pledge if it would keep us out of the then probable war in Europe.

This was only one of the many warnings given to us officially in the effort to persuade us not to interfere with what Japan was doing in the Far East, nor, moreover, with what Germany was then about to do in Europe. It is chosen only because of its early date, three months before the war in Europe began. On went the warnings—and at the same time the Army's and the Navy's aggressions—showing that they were determined and were confident. Finally came the unmistakable warning, the making of the alliance between

Japan and the Axis Powers, which took place in September, 1940, followed by the public pronouncement by Yosuke Matsuoka, then Foreign Minister, that this alliance was made with the purpose of deterring the United States from entering the war.

This leads back to the question of how in face of the evidence could our Army and Navy commands at Pearl Harbor have been "off alert" on that memorable Sunday of December 7, 1941. It was hardly the State Department that was to blame. Even if the Department had not adequately informed the Navy, the press of the nation was headlining the gravity of the situation daily for eleven days prior to the attack, from November 26—the date of Secretary Hull's definite though diplomatic refusal of Japan's diplomatic but definite demand for oil and other supplies and for a cessation of our assistance to China. The die had been cast. And yet the men in command of the naval base that had been constructed solely with a view to Japan as the potential enemy refused to believe the Japanese would have the audacity to attack. The trouble is we would not believe what the Japanese had told us, that they were not afraid to go to war with us. We persisted in thinking that they were bluffing.

There is one revelation which shows how even in a democracy like ours open diplomacy is impossible. When the war began in Europe, in 1939, the Japanese Government immediately called upon the British and the French to remove their naval vessels and troops from those sections of China occupied by the armed forces of Japan. On being informed of this by cable from Ambassador Grew, Secretary Hull immediately, and, as he says, emphatically, protested, through the Japanese Ambassador, Kenkichi Horinouchi, in Washington. An account of his lengthy argument is given. This intervention was, of course, in American interest, but it was nevertheless a direct and early alignment of the country with the nations fighting Germany. One reason why this protest could not have been made public at the time is the extent of the opposition it would have aroused from men like Colonel Robert McCormick and papers like his Chicago Tribune. From many quarters a screech of protest would have gone up that the State Department was "pulling British chestnuts out of the fire." The politics and the freedom of speech in a democracy like ours compels a measure of secret diplomacy no matter which party is in power. A Republican Administration would have been in the same predicament.

Among the last two documents in the second volume are the communications of the President to the Emperor of Japan and to the Congress of the United States, the one dated December 6, and the other December 8, 1941. Though both of these were made public at the time, they bear repeating. In the first the President said, "Only in situations of extraordinary importance to our two countries need I address Your Majesty messages on matters of state. I feel I should now so address you because of the deep and far-reaching emergency which appears to be in formation. Developments are

occurring in the Pacific area which threaten to deprive each of our nations and all humanity of the beneficial influence of the long peace between our two countries. These developments contain tragic possibilities." In the message to Congress two days later he said, "Yesterday, December 7—a date which will live in infamy—the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan. . . . I ask that the Congress declare that since the unprovoked and dastardly attack by Japan . . . a state of war has existed between the United States and the Japanese Empire."

War was upon us months before the President's message to the Emperor. The volumes are replete with protests, scores of them, made by the State Department to the Japanese Foreign Office against the bombing of American properties and the infringements of American rights in China, and in July, 1941, we had at last, after finding our years of remonstrances ignored, issued the "freezing" order that cut off all but diplomatic relations.

That the President and several Government Departments made mistakes in this long story there can be no doubt. But if any fairminded man thinks that another Administration could or would have handled the exceedingly complex situation any better he would do well to read these revealing volumes. The mistake of misjudging the Japanese defiance was an all-America blunder. We had belittled them so long that we had deluded ourselves about their determination and their capacity. They were going ahead, come what might, and we thought until too late that they would not "go the limit."

FREDERICK MOORE

Peace and War. United States Foreign Policy, 1931–1941. Issued by the United States, Department of State. Washington, Government Printing Office, 1943. Pp. xxii, 874. Index. $2.00.

This volume, dated July 1, 1943, contains a publication previously released on January 2, supplemented—as was then promised would be done—by this later publication of the documents referred to therein. Nearly 600 pages of documents to the number of 271 constitute the substantiation of the State Department's account or report to the nation as well as to the public of all of the United Nations. It portrays the manner in which during "the fateful decade" the Roosevelt Administration in general and the State Department in particular conducted our foreign relations. That decade "began and ended with acts of violence by Japan." The beginning acts of aggression in Manchuria led to the enunciation of our non-recognition policy (Document 5, pages 159–160). This was an emphatic statement in support of international law and justice and a worthy exercise of the moral influence of this nation. This nation will never cease to be proud of the declaration of the so-called Stimson doctrine, but few realize that it threw down the gauntlet to Japan,—the gauntlet which was so treacherously picked up at Pearl Harbor. The

enunciation of Secretary Stimson's doctrine put Japan on notice that she must yield or that sooner or later she must come into conflict with the United States. The citizen who reads the record as revealed in these documents must be impressed with the ability of our foreign representatives,—who kept the Department informed of the gathering clouds of war. Let him read the Miller report on the Nazis (pages 211–214) and Ambassador Grew's reports contained in documents 247 and 248, and especially his telegram of November 17, 1941, in which he emphasized "the need to guard against sudden Japanese naval or military action in such areas as are not now involved in the Chinese theatre of operations. I take into account," he stated, "the probability of Japanese exploiting every possible tactical advantage, such as surprise and initiative."

Less commendable and more difficult to justify was President Roosevelt's signing of the Neutrality Act, which did so much to tie our hands. No doubt it expressed the will of Congress but it was an opinion born of ignorance in regard to the significance of the international situation and was based upon the false belief that this country could remain neutral in the event of a European war. This is perhaps the one weak spot in President Roosevelt's otherwise brilliant conduct of our foreign relations.

The final series of documents indicate clearly that our relations with Japan were headed for a break and Secretary Hull himself on December 1, told the Japanese Ambassador ". . . one of these days we may reach a point when we cannot keep on as we are." Evidently the record shows that it was no surprise that war came nor even that the Japanese might launch a surprise attack. The only surprise seems to have been due to the unexampled and crass inefficiency of those responsible for the defense of Pearl Harbor. It seems to have been the story of Aegospotami over again. Fortunately we have not been made to pay the same penalty as did the Athenian Republic.

The Department of State has been blamed for not playing up the danger of war with Japan. Certainly every army and navy official was expecting the outbreak. Only the point of attack was perhaps unexpected. If the State Department gives out statements which emphasize the seriousness of the negotiations they render a peaceful solution just so much the more difficult. Insofar as relates to the Japanese negotiations Secretary Hull and the Department of State would seem deserving of high commendation instead of carping criticism.

We should be grateful to the Department for this timely and most instructive publication. Let Japan and the Nazis search their archives to match, if they can, this record to be read by the present generation and to demonstrate to all posterity the justice of our cause.

ELLERY C. STOWELL

NOTES

Intergovernmental Commodity Control Agreements. Issued by the International Labour Office. Montreal: International Labour Office, 1943. Pp. lviii, 221. Documents. Appendixes. Index. $2.00 paper. This is the first general work on the international control of raw materials to appear since the study by Wallace and Edminster (1930) and the somewhat more popular *Markets and Men* by Rowe (1936). Since the majority of the present basic systems of commodity control were established after 1938 and since the whole technique of commodity control has been very considerably altered by war, the publication of this new and carefully prepared study by the International Labour Office is particularly welcome. It should be very useful in all economic post-war planning.

Nearly four-fifths of the book is devoted to a printing of the texts of the major international commodity control agreements, including the statements of policy made by the wartime commodity control agencies such as the Combined Raw Materials Board. Students should welcome the privilege thus accorded them of going to one source for this material hitherto available only in scattered documents. The first 58 pages of the book, though called "introduction" by the authors, really constitute an interpretation with concrete proposals for future action, and it is with this section of the work that this review is mainly concerned.

Commodity control agreements, to be effective in the long run, must aim at the expansion of consumption rather than the restriction of production. This end may be achieved by the establishment of a general international commodity control organization which would not be subject to the pressures of individual producing interests. Special authorities for the control of particular products would still exist but they would operate within the framework of the larger organization and would be required to submit to it periodic reports concerning their operations and probable trends of supply and demand. The principal consuming interests should also be represented on the international control body with authority to assist in the determination of policy and with access to all relevant information. This proposal, of course, stands in sharp contrast to the existing policy of allowing consuming interests, if they are represented at all, merely to "tender advice." To safeguard the interests of labor, especially when the major producers are located within colonial areas, labor should be represented on the international body and the coöperation of the International Labour Organisation should be sought. Other advantages of an international control office are listed: assisting in international relief, grading and quality, control the improvement of storage facilities, and conservation. By granting greater authority to the international control organization questions of interpretation will arise and these should be referred to a commercial division of the World Court.

In view of the extensive authority to be granted the international control organization the authors' conclusion that it must be "effectively integrated in a general pattern of international economic organisation" (xlii) appears to be an understatement. Some form of international government would also seem to be necessary.

CARL KREIDER

Collective Security: the Why and How. By Joseph H. Ball. Boston: World Peace Foundation, 1943. Pp. vi, 63. Bibliography. $.25. This small book by Senator Ball is a primer which should be widely read. It is

the work of a liberal statesman who looks ahead and then does not shut his eyes upon what he sees. He castigates the dangerous fallacies which urge us to "wait and see" and which overcomplicate the problem of peace by assuming that all the complex problems of humanity must be settled before we can begin to have peace.

Aware that we will soon forget what a close call we had in this war, the author warns that permanent militarism is incompatible with democracy, as is balance of power manoeuvering with war always the end result. He makes crystal clear that if the peace is to be kept it must be on the basis of principles that all nations can accept. Believing that only collective security can give our democracy a chance to live and grow, Senator Ball stands for a stronger League of Nations than we had before, one which can act in its councils by the two-thirds vote of democratically elected representatives, who have a true international police force behind them. He recognizes that we may not go so far now but feels that the appalling probability that our free institutions could not survive World War III should stimulate real progress. Nor is he deterred by those who "will be opposed to giving up even this unlovely right of unlimited national sovereignty—the right of the strong to conquer the weak if they feel so disposed."

Among other compelling things in the book is the sincerity of his tributes to the statesmanship of Woodrow Wilson.

D. F. FLEMING

The Future of South-East Asia—An Indian View. By K. M. Panikkar. New York: Macmillan Co., 1943. Pp. 126. Index. $1.75. This interesting little book presents an original solution to many of the post-war problems of the much discussed colonial area of southeastern Asia. The originality, however, stems less from the form of government suggested for each of the countries than from the insistence of Mr. Panikkar that the future security and welfare of "Further India" (South-East Asia) depend on India.

The essential prerequisite of the writer's scheme is "a free and stable government in India, conscious of its responsibilities and capable of playing its part in South-East Asia." The former political system of these countries would be "so modified as to ensure the participation of the local population in government and the gradual liquidation of the colonial system and its replacement by a political organization which will in time guarantee the freedom of the peoples of this area."

According to Mr. Panikkar, India should, after the war, be split into the two states of Hindustan and Pakistan, and joined with an independent Burma into a Triune Commonwealth, allied militarily with Great Britain for purposes of defense; Thailand and the Philippines would be independent, and the Netherlands Indies an autonomous, coequal partner in the Dutch Commonwealth; Indo-China would be divided into the two states of Annam and Cambodia under the protection of, and in alliance with, France; finally, the various Malay states in British Malaya would be federated under a strong central government based on popular representation but under the guidance of Great Britain in a relationship similar to that of Panama and the United States.

It is suggested that this evolution take place under the aegis of international supervision, the international authority to consist of representatives of Great Britain, the Netherlands with the Netherlands Indies, the United States, France, China, India, Australia, and possibly two members representing other countries less vitally interested in the region. The period of politi-

cal tutelage, under well-defined safeguards, would be strictly limited to the time necessary for training the indigenous peoples to take up their own responsibilities.

In general the writer shows an exceptionally good understanding of the complicated nature of the underlying problems of this vital area which is the source of much of the world's supply of rubber, tin, oil, and other essential materials. Unquestionably India will play an increasingly important role in southeastern Asia but the author's insistence that the whole region depends on India appears to have been slightly exaggerated by his spirit of Indian nationalism, especially as elsewhere in the book he has pointed out that defense depends on a system of collective security based primarily on the power of the United States and Great Britain and only secondarily on India and Indonesia.

This little book, which is particularly interesting as the expression of the viewpoint of an Indian scholar, presents a reasonable and liberal compromise for the colonial powers and Asiatic nationalist groups and is a welcome contribution to the rather limited literature on the subject.

DOROTHY GRANT JACQUELIN

Winning the Peace in the Pacific. By S. R. Chow. New York: Macmillan Co., 1944. Pp. xii, 98. Index. $1.50. This first authentically Chinese view of the prerequisites to a Pacific settlement is a welcome contribution to current discussion of post-war plans. Brief as it is, Professor Chow's book covers all the major issues in the field. Based on a thorough canvass of recent Western materials as well as his own first-hand knowledge of China, it is written simply and clearly yet with scholarly accuracy.

Considerable progress has already been registered in one of the four major areas treated by Professor Chow. Abrogation of the unequal treaties by the United States and Great Britain and changes by Congress in immigration and naturalization laws affecting Chinese, both accomplished in 1943, have gone far to establish a status of full equality for China. This newly won position has since been strengthened by Chinese participation in the Moscow and Cairo conferences, so that it may be assumed as one of the given elements in the post-war Far East. The Cairo declaration also confirmed a number of points made by the author in a second field—that of the treatment of Japan. To the territorial provisions there stated the Chinese would add the retrocession of Hongkong, apparently one of their essential demands. No strong view is expressed with regard to the Japanese Emperor; arguments *pro* and *con* are given, and then it is suggested that if the Japanese people themselves dispose of him the United Nations should approve. The need for effective disarmament of Japan is stressed.

In the colonial field it is urged that India be given full freedom and that Korea, preferably with United States assistance, be aided in attaining freedom as soon as possible. Independence is already pledged to the Philippines; other Southeast Asia dependencies should attain self-government by progressive stages. If Indo-China is mandated, China should receive first consideration as the mandatory power. Chinese nationals living in Southeast Asia territories must be granted legitimate minority rights.

The problem of post-war organization is handled by a suggested regional organization, with its own legislative and executive organs, a court with compulsory jurisdiction over justiciable disputes, an international military staff and force, and a permanent secretariat. Where required this regional body should dovetail with a world organ. It is interesting to note that Dr.

Hu Shih, in a foreword, opposes any such regional Pacific Council in favor of a single world-wide international agency.

In his concluding remarks the author indicates that after the war "China will most likely direct her political reconstruction towards the goal of constitutional democracy." Though not so stated this also is likely to prove one of the significant influences upon the final outcome in the Pacific. Only a democratic China will be able to make the constructive contribution to world stability that is outlined in these pages.

T. A. BISSON

President Beneš on War and Peace. New York: Czechoslovak Information Service, 1943. Pp. 162. Index. Whether one agrees or disagrees with Dr. Beneš' opinions and policies it can hardly be denied that he is one of the very few European statesmen of international repute. Because of his multifarious political activities outside of his own country many people are inclined to see in the man primarily the internationalist and are apt to overlook that he is in the first place an ardent Czechoslovak or Czecho-Slovak nationalist. Yet Dr. Beneš appears in proper perspective only if one takes into consideration the nationalist as well as the internationalist. The present booklet contains statements made during his visit to the United States and Canada in May and June 1943. Numerous problems of post-war reconstruction are touched upon in these speeches and interviews. It is, of course, interesting to learn Dr. Beneš' attitude on these problems. He seems, at present, less concerned with a Central European Federation of Poland, Czechoslovakia, Yugoslavia, and Greece than he used to be. At all events he states that "such a grouping must not be aimed against the Soviet Union" (p. 127). He thinks moreover that any integration of smaller states into larger blocs must be acceptable to the Great Powers—by implication Russia, the United Kingdom and the United States—on whose coöperation the future security and economic reconstruction of Europe will depend. At the same time he wants to regain for Czechoslovakia its pre-1938 position and expects that Hungary, Rumania, and Bulgaria will be compelled to restore those territories which they have received since 1938, and advocates the liberation of Austria. He denies the existence of hyphenated Czechoslovaks though his statements on this point are not always consistent (*cf.* pp. 44 and 64). As for minority problems in Europe he suggests the transfer of population as a means of eliminating friction among minority groups (p. 137). As concerns post-war reconstruction in general he apparently subscribes to the following principles: a transitional reconstruction period before the final peace; a permanent system of security initiated by the United Nations; and collaboration in this system by the Soviet Union and the United States. Unfortunately some "globaloney" has crept into the pamphlet, for it is not quite clear what the distinguished author means by saying that World War II is "more global" than World War I. Likewise Dr. Beneš' statements on democracy in Czechoslovakia are open to question. Whether his interpretation of the situation as it prevailed from 1918–1938 is accurate is comparatively immaterial. However, in the light of Dr. Beneš' own reports to the League of Nations on the reasons for not granting autonomy to Carpatho-Russia it is open to doubt whether it will be feasible in the near future to establish a special central parliament in the Carpatho-Russian district. In any case Dr. Beneš' approach to these and other issues should by no means be ignored. Hence everybody interested in the reconstruction of Europe should be familiar with this pamphlet.

HANS AUFRICHT

Inter-American Affairs—1942. Edited by Arthur P. Whitaker. New York: Columbia University Press, 1943. Pp. x, 252. For the student of Inter-American relations the series of annual reports, started by Dr. Whitaker, beginning with the year 1941, is proving a most valuable work for ready reference, substantial commentary, and up-to-date information. The second volume, covering the momentous year 1942, maintains the high standards of accuracy, laboriousness, impartiality, and keen insight which characterized the first.

1942 was a year of exceptional importance in the history of our hemisphere. It marked the highest point and the triumphant vindication of continental solidarity when the twenty-one republics gathered in Rio de Janeiro to consult together after the treachery of Pearl Harbor, and virtually constituted an All-American front to resist totalitarian aggression. Political and diplomatic events are ably discussed by Dr. Whitaker in his chapter on *The Inter-American System.* Equally valuable is the chapter by John P. Humphrey on *Canada,* whose ties with the other American nations are becoming closer day by day, not only in the commercial and economic but also in the diplomatic field.

Studies of manifest interest and merit are also those contributed on the subjects of *Industry, Commerce and Finance,* by George Wythe and Constant Southworth; on *Cultural Relations,* by William Rex Crawford; on *Social Welfare in Latin America,* by Katharine F. Lenroot; on *Health and Sanitation,* by George C. Dunham; on *Technical Coöperation,* by Kenneth Holland. A List of References, Statistical Tables, a complete *Chronology* and a remarkable Index, facilitate considerably the search for data and information on every aspect and every fact of the vast network of intra-continental relationships.

RICARDO J. ALFARO

La Aportación Vasca al Derecho Internacional. By Jesús de Galíndez. Buenos Aires: Editorial Vasca Ekin, 1942. Pp. 192. 2.25 pesos arg. This little book offers chiefly an appreciation of the contribution of Francisco de Vitoria to modern international law, with a brief discussion of the basis, evolution, and possible future of that law. It contains a short sketch of Simón Bolívar, another Basque, as a symbol of the liberty which Vitoria extolled and, in the Panama Congress of 1826, the originator of Panamericanism. It also offers very interesting and sympathetic sketches of the history, decadence, and renaissance of Basque culture in general. It is not necessary to agree wholly with the eulogistic view of Vitoria's theories held by the author to find much of interest and considerable food for thought in this work of a former Assistant Professor in the Central University of Madrid, since the Spanish Civil War a refugee and teacher in the Dominican Republic.

GORDON IRELAND

A Política Exterior do Brazil, 1930–1942. By Jayme de Barros. Rio de Janeiro: Zelio Valverde, 1943 (2nd ed.) Pp. 308, iv. This book discusses Brazil's foreign policy from the revolution of 1930 up to Brazil's entry into the war on August 22, 1942, that is, during the presidency of Getulio Vargas. As in every authoritarian dictatorship, there is in Brazil a "Vargas cult." Inevitably the book extols the wisdom of the "Chief of Government." Nevertheless, it is an accurate and well-documented study, giving new details, especially as to Brazil's diplomatic attitude. As it contains many

pages treating of questions of international law, and reprints fully numerous diplomatic notes, declarations of conferences, and, particularly, Brazilian neutrality decrees with regard to the Leticia Affair, the Chaco War, and the present war, it is of interest not only to the historian but also to the international lawyer.

After an introduction, devoted to the main currents of Brazilian diplomacy from the attainment of independence down to 1930, the author discusses the reforms (in 1931 and 1938) of Brazil's Ministry of Foreign Affairs and the foreign economic policy of Vargas.

A detailed account of Brazil's attitude in the Leticia Affair follows. This attitude was characterized by the strictest neutrality in the traditional sense and Brazil's successful efforts toward a peaceful settlement of the conflict, reached by the Rio Protocol of May 24, 1934.

A full picture of Brazil's attitude in the Chaco conflict of 1928–29 and the Chaco War is given. Again strictest traditional neutrality, first a cautious attitude of reserve, later full participation in conciliatory efforts, leading to the Peace Protocol of June 12, 1935, and, after the long labor of the Buenos Aires Peace Conference, to the definitive Treaty of Peace of July 19, 1938.

The greater part of the book is devoted to Brazil's Pan-American policy. The original isolation from Spanish America is emphasized, from which Brazil was separated by language, by tradition, by the existence of the Empire, and by the retention of slavery. This led to a Spanish American animosity against Brazil, which was accused of imperialistic tendencies. The war of 1825 with Argentina, Brazil's non-participation in Spanish-American Congresses, the different interpretations of the principle of *uti possidetis* put forward in Brazil and other countries in conflicts over frontiers illustrate this situation.

From the beginning of her independence Brazil's foreign policy attracted her toward the United States, the other American State separated from Spanish America, which for a long time nourished sentiments of animosity against the *peligro yanqui*. Washington became from the beginning Brazil's diplomatic center of gravitation. And Brazil, as the chapter on "Brazil and the Monroe Doctrine" shows, stood from the beginning for the continentalization of the Monroe Doctrine and for the idea of collective defense of the Americas.

Brazil's activity in the new Pan-Americanism from 1889 to the turning point of the good neighbor policy, and then at Montevideo in 1933, at Buenos Aires in 1936, and at Lima in 1938 follows. In the antagonism between Argentina and the United States, which the author interprets as an antagonism between universalism and continentalism, Brazil, the long-standing friend of the United States and yet enjoying the best of relations with Argentina, played the role of a mediator.

At the beginning of the present war Brazil again proclaimed strictest neutrality in the traditional sense. The author discusses the meetings of Panama (1939), Habana (1940), and (in great detail) Rio de Janeiro (1942), where Brazil again played the role of mediator between the United States and Argentina. He correctly states that the corresponding Rio resolution on the breaking of relations with the Axis was legally not obligatory but a simple recommendation. The book concludes with Brazil's breaking of relations with the Axis and her entry into the war.

The author is, on the other hand, completely silent on Brazilian foreign policy between Dunkirk and Pearl Harbor. Not a word about Vargas openly coming out for Fascism in June, 1940, about the split between the

generals, deeply impressed by German victories, and the pro-democratic party, led by Oswaldo Aranha, or about the oscillations of Brazilian neutrality policy during this period. But whatever these oscillations may have been (see *Loewenstein:* Brazil under Vargas, New York, 1942, pp. 274–284), it is undeniable not only that Brazil is traditionally our greatest friend in Latin America but also that Brazil's military and economic coöperation constitutes an important contribution toward winning the war.

JOSEF L. KUNZ

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WILBUR S. FINCH

ANNUAL MEETING OF THE SOCIETY IN 1944

The Thirty-Eighth Annual Meeting of the American Society of International Law will be held at Washington April 28–29, in the Carlton Hotel. Arrangements have been completed by the Committee on Annual Meeting, under the thoughtful chairmanship of Mr. Edgar Turlington. Mr. George A. Finch has been added to the Committee. It is suggested that members who will require hotel accommodations make early reservations. In the event that rooms are not available at down-town hotels, reservations may usually be secured at the Roosevelt or Lee Sheraton Hotels.

The general topic of the meeting will be "International Law in the Post-War World." With the supplement to this edition of the JOURNAL devoted to the publication of a statement entitled "The International Law of the Future," it is apparent that the Society and the Editors of the JOURNAL foresee the need for courageously planning an orderly post-war world to assure a lasting peace. The President of the Society, Mr. Frederic R. Coudert, will open the meeting on Friday evening, April 28, at 8:15 o'clock. Addresses will then be presented by the Honorable Manley O. Hudson and the Honorable John J. Parker, Senior Judge, United States Circuit Court of Appeals for the Fourth Circuit. The opening session will be followed by an informal reception.

On Saturday morning, April 29, at ten o'clock, Mr. Howard B. Calderwood, Professor of Political Science, University of Michigan, will discuss "Conflicts of National and International Jurisdiction." "Law and Peaceful Change" will then be discussed by Mr. Frederick S. Dunn, Professor of International Relations, Yale University. Both topics will be followed by informal discussion from the floor.

On Saturday afternoon at two o'clock, Mr. Quincy Wright, Professor of International Law, University of Chicago, will address the Society on "The Enforcement of International Law." The discussion will be led by Mr. Edward P. Warner, Vice-Chairman of the Civil Aeronautics Board.

The business meeting of the Society will be held at three o'clock, to be followed by a meeting of the Executive Council.

The Annual dinner at the Carlton Hotel will be preceded by an informal reception at 7:30 o'clock on Saturday evening. Mr. Coudert, as toastmaster, will present the following speakers:

The Right Honorable the Viscount Halifax, K.G., British Ambassador to the United States.

Hon. Tom Connally, Chairman of the Committee on Foreign Relations, United States Senate.

Hon. Felix Morley, President of Haverford College.

Dress will be optional.

In accordance with the advance notice mailed to members of the Society, it is requested that reservations for the annual dinner be mailed promptly in view of the limited accommodations available and the necessity for additional advance notice to the hotel on account of existing conditions.

Special attention is called to the luncheon meeting of the American Bar Association, Section of International and Comparative Law, to be held at Washington in the Mayflower Hotel on Friday, April 28 at 12:30 p.m. Tickets at $2.00 each may be secured from Mr. R. A. Bogley, Hibbs Building, Washington, D. C. Advance reservations are essential. "Post-War Judicial Organization" will be discussed and important committee reports presented. Society members are cordially invited by the Council of the Section to attend this meeting, and members of the Section have been invited to the Society's meetings.

JAMES OLIVER MURDOCK
Secretary

OFFICIAL DOCUMENTS

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* Not official; see Prefatory Note to the document.—ED.

THE INTERNATIONAL LAW OF THE FUTURE

POSTULATES, PRINCIPLES AND PROPOSALS

January 1, 1944

This statement of a community of views by a number of North Americans actively interested in international law has been formulated to aid in "revitalizing and strengthening international law," [1] and in "laying the bases of a just and enduring world peace securing order under law to all nations." [2]

Prefatory Note

Early in 1942, a number of Americans and Canadians began to consider the possibility of arriving at a community of views with reference to the steps which might be taken at the end of the war to increase the usefulness of international law. The discussions led to numerous investigations, and to a series of exploratory meetings held at Washington, April 24, 1942; at New York, May 30–31 and June 27–28, 1942; at Washington, July 26, 1942; and at Boston, August 8–9, 1942.

A draft then prepared was considered at a second series of meetings held at New York, September 20, 1942; at Washington, September 26–27, 1942; at Chicago, October 10–11, 1942; at Philadelphia, October 17–18, 1942; and at Montreal, November 14–15, 1942.

A second draft, with an extensive comment, was considered at a third series of meetings held at Boston, January 24, 1943; at New York, February 6–7, 1943; at Philadelphia, February 13–14, 1943; at Washington (two groups), February 26 and February 27–28, 1943; at Chicago, March 6–7, 1943; at Ottawa, March 27–28, 1943; at Los Angeles, April 10–11, 1943; at San Francisco, April 16–17, 1943; and at Denver, April 23–24, 1943.

In the course of the preparation of a third draft, a tentative sketch was submitted for comment to the participants in the discussions, and a further meeting was held at Boston and Annisquam, July 3–5, 1943. A third draft was circulated on August 7, 1943.

The meetings were attended by different groups of men, but continuity was maintained by the presence of a few individuals at all of the meetings. Each of the groups was composed of men chiefly Americans and Canadians, who were known to have an active interest in international law. The participants in the discussions, almost two hundred in number, were invited

[1] This phrase is from the statement of Fundamental Principles of International Policy, made by the Government of the United States of America and approved by numerous other Governments in 1937.

[2] This phrase is from the preamble to the Mutual Aid Agreements concluded by the United States of America with Belgium, China, Czechoslovakia, Ethiopia, Great Britain, Greece, Netherlands, Norway, Poland, Union of Soviet Socialist Republics, and Yugoslavia in 1942 and 1943.

without regard to their political affiliations or their special views. They included judges, practicing lawyers, professors, government officials and men of special international experience.

The statement which follows is presented as a community of views, formulated after thorough and repeated consultation. Different features of the statement are due to contributions by different men, and some of the participants who accepted the Postulates and Principles did not subscribe to all of the Proposals. The statement in its entirety reflects the views of a large number of the participants, but it is not to be taken either in whole or in part to represent the individual views of any particular person who participated in the discussions.

The participants in the discussions included, among others, the following:

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Introduction

For the second time in a single generation, most of the peoples of the world have become engaged in a world war.

The fact offers an insistent challenge to the intelligence of mankind. Unless escape can be found from the recurrence of such struggles, constructive effort will remain subject to periodical frustration, and energy which might be devoted to advancing the general welfare and to relieving peoples from want and distress will continue to be directed into channels of destruction. The spirit of man cries out for a better way of life.

In days of crisis, it is a temptation to confine discussion to immediate questions of policy and expediency. Important as such questions now are, consideration must be given at the same time to the long-term conditions upon which an enduring peace will depend.

The search for means and methods of attaining security from war encounters problems of many aspects—economic, ethical, legal, political, psychological and social. If no one profession can supply the skill and imagination required for their solution, no profession can evade responsibility for making its contribution. A special responsibility would seem to rest on the legal profession, and particularly on members of the legal profession who have had experience in international law. For security depends upon the maintenance of an effective legal order.

The modern system of international law represents a continuous development over a period of more than three hundred years. The last hundred years have seen a remarkable progress of the law governing the relations of States. As changes have been wrought in world society, as the population of the world has grown, and as technological advances have brought peoples closer together, international law has been greatly enlarged in its content, and greatly extended in its operation. Yet, as a system, it has hardly passed out of the stage of primitive law. As an instrument for meeting the needs of the twentieth century, it has remained lamentably weak.

The development of international law has been retarded both by the lack of international organization and by the insistence of States upon a freedom to use force to accomplish their ends. It was only in the middle of the nineteenth century that States abandoned their prejudice against attempts to meet their common problems by general and concerted effort. A process of international legislation was begun with reference to problems which could not be solved by measures taken by individual States, and the latter part of the century was marked by the formation of several successful leagues of nations for specific purposes. At the turn of the century, efforts were made to reduce armaments and to restrict the use of force, but with disappointing results.

When a world war came to an end in 1918, disposition existed to push out along new lines, and remarkable progress was made over a period of years. Intelligence and zeal were devoted to current problems of international life on an unprecedented scale, and some advance was made toward a proscription of force. If a larger measure of success did not attend these efforts, it was due to a variety of causes—to the halting participation of some States, to the pursuit of national policies antagonistic to the general interest, and to dissatisfaction with the territorial and economic arrangements which had been established. The experience demonstrated that no scheme of organization and no method of procedure can be enough in itself. Enduring progress requires a sustained willingness of peoples to pursue common effort.

With the United Nations playing the dominant role at the end of a second world war, with large power concentrated in the hands of peoples who desire to seek escape from the recurrent necessity of mobilizing for destruction, a world situation may exist in which the further progress of organized effort can be assured. To this end, departures will have to be made, new methods will have to be tried, new institutions will have to be created, and sound legal foundations will have to be laid. The task must be approached not only with a knowledge of the history of the past, but also with a willingness to appreciate the lessons of that history.

Lines which might be followed in shaping the international law of the future are set forth here under three headings: *Postulates*, *Principles*, and *Proposals*.

The *Postulates* are included to indicate the premises which are essential for the establishment and maintenance of an effective legal order in a world of States. They are the foundations on which the *Principles* and *Proposals* have been drafted. Derived from the experience of the past, they present also an outlook on the future.

The *Principles* are offered as a draft of a declaration concerning the international law of the future which might be adopted by a competent international authority. Many precedents exist for such a declaration. Great international conferences have frequently promulgated principles of international law, and some of the declarations made during the past hundred years have had enduring influence. Such formulations in the past have usually emphasized the rights of States; in these *Principles* the emphasis is placed on the duties of States to which their rights are correlative.

The *Proposals* are presented, not as a draft of an international instrument, but as indications of measures which might be adopted to implement the *Principles*. They do not purport to forecast the precise political conditions which will prevail at the close of the war, nor are they intended to deal with the vexing problems which will need to be faced in the course of the transition

from war to peace. They are confined to the dispositions which might be adopted and the institutions which might be maintained for the ordering of the future world society. They propose agencies and methods and procedures by which the solution of recurring problems can be sought, rather than the precise solutions to be given to such problems.

Following the text of the *Postulates*, *Principles* and *Proposals*, a comment is added which reviews the history of the past and explains the needs of the future.

POSTULATES FOR THE INTERNATIONAL LAW OF THE FUTURE

POSTULATE 1

The States of the world form a community, and the protection and advancement of the common interests of their peoples require effective organization of the Community of States.

POSTULATE 2

The law of the Community of States is international law. The development of an adequate system of international law depends upon continuous collaboration by States to promote the common welfare of all peoples and to maintain just and peaceful relations between all States.

POSTULATE 3

The conduct of each State in its relations with other States and with the Community of States is subject to international law, and the sovereignty of a State is subject to the limitations of international law.

POSTULATE 4

Any failure by a State to carry out its obligations under international law is a matter of concern to the Community of States.

POSTULATE 5

Any use of force or any threat to use force by a State in its relations with another State is a matter of concern to the Community of States.

POSTULATE 6

The maintenance of just and peaceful relations between States requires orderly procedures by which international situations can be re-adjusted as need arises.

PRINCIPLES FOR THE INTERNATIONAL LAW OF THE FUTURE

PRINCIPLE 1

Each State has a legal duty to carry out in full good faith its obligations under international law, and it may not invoke limitations contained in its own constitution or laws as an excuse for a failure to perform this duty.

PRINCIPLE 2

Each State has a legal duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind.

PRINCIPLE 3

Each State has a legal duty to refrain from intervention in the internal affairs of any other State.

PRINCIPLE 4

Each State has a legal duty to prevent the organization within its territory of activities calculated to foment civil strife in the territory of any other State.

PRINCIPLE 5

Each State has a legal duty to coöperate with other States in establishing and maintaining agencies of the Community of States for dealing with matters of concern to the Community, and to collaborate in the work of such agencies.

PRINCIPLE 6

Each State has a legal duty to employ pacific means and none but pacific means in seeking to settle its disputes with other States, and failing settlement by other pacific means to accept the settlement of its disputes by the competent agency of the Community of States.

PRINCIPLE 7

Each State has a legal duty to refrain from any use of force and from any threat to use force in its relations with another State, except as authorized by the competent agency of the Community of States; but subject to immediate reference to and approval by the competent agency of the Community of States, a State may oppose by force an unauthorized use of force made against it by another State.

PRINCIPLE 8

Each State has a legal duty to take, in coöperation with other States, such measures as may be prescribed by the competent agency of the Community of States for preventing or suppressing a use of force by any State in its relations with another State.

PRINCIPLE 9

Each State has a legal duty to conform to the limitations prescribed by the competent agency of the Community of States and to submit to the supervision and control of such an agency, with respect to the size and type of its armaments.

PRINCIPLE 10

Each State has a legal duty to refrain from entering into any agreement with another State, the performance of which would be inconsistent with the discharge of its duties under general international law.

PROPOSALS FOR THE INTERNATIONAL LAW OF THE FUTURE

I. ORGANIZATION OF THE COMMUNITY OF STATES

PROPOSAL 1

(1) The Community of States should be organized on a universal basis. All States which exist or which may come into existence in the future should be included. No provision should be made for the expulsion or withdrawal of any State.

(2) The organization of the Community of States on a universal basis should not preclude the organization of groups of States on the basis of regional propinquity, historical relationship, or mutuality of interest, for purposes not inconsistent with those of the universal organization. The activities of agencies of such groups of States should be coördinated with the activities of the agencies of the Community of States.

PROPOSAL 2

(1) A General Assembly, in which all States should be entitled to representation, should be established to serve as the general representative and deliberative organ of the Community of States.

(2) The General Assembly, meeting as occasion may require and at least once each year, should have general power to deal with any matter of concern to the Community of States. Except as may be expressly provided otherwise, its decisions should require only a majority vote.

PROPOSAL 3

(1) An Executive Council, in which States should be entitled to representation, should be established to serve as the general executive organ of the Community of States.

(2) The Executive Council, meeting as occasion may require and at least four times each year, should have general power to deal with any matter of concern to the Community of States. Except as may be expressly provided otherwise, its decisions should be taken by unanimous vote, but decisions with regard to matters of procedure and appointments should require only a majority vote.

PROPOSAL 4

(1) In the selection of States for representation in the Executive Council, special consideration should be given to the importance of their rôle in international affairs. Initially, the States entitled to representation in the Executive Council should be named. Certain States might be named as entitled to representation until the selection of their successors; other States might be named as entitled to representation for a fixed period, or for fixed periods, of years. The selection of their successors, and possibly of

other States to be entitled to representation, should be entrusted to the General Assembly.

(2) Any State not represented in the Executive Council should be entitled to participate, without a vote, in the consideration by the Executive Council of any matter specially affecting its interests.

PROPOSAL 5

(1) Except as may be expressly provided otherwise, the General Assembly and the Executive Council should have power to establish their own rules of procedure.

(2) Subject to such exceptions as may be provided in the rules of procedure, meetings of the General Assembly and the Executive Council should be held in public and the minutes of all meetings should be published promptly.

PROPOSAL 6

The General Assembly should have power to deal with all questions relating to the general budget, to decide upon methods of providing funds for meeting expenses, and to fix the proportions in which States should contribute to such funds.

PROPOSAL 7

The General Assembly should have power, by two-thirds vote and with the concurrence of the Executive Council, to modify general rules of international law and to enact new general rules of international law.

PROPOSAL 8

(1) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of any alleged failure by a State to carry out its obligations under international law, and if the failure is established to take such action as it may deem to be necessary for the protection of the interests of the Community of States.

(2) If the State which is alleged to have failed to carry out its obligations is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

PROPOSAL 9

(1) The Executive Council should have power, with the concurrence of the General Assembly, to adopt general provisions for preventing or suppressing the use of force by States in their relations with other States.

(2) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of any use of force or threat to use force by a State in its relations with any other State, to take such action as it may deem to be necessary for the protection of the interests of the Community of States, and to prescribe the specific measures to be taken by States for preventing or suppressing the use of force.

(3) If the State which has used force or threatened to use force is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

PROPOSAL 10

(1) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of the prevalence within the territory of any State of conditions which menace international peace and order, and to take such action as it may deem to be necessary for the protection of the interests of the Community of States.

(2) If the State within whose territory the conditions prevail is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

PROPOSAL 11

(1) The Executive Council should have power, with the concurrence of the General Assembly, to create and maintain such special agencies as may be needed for dealing with matters of concern to the Community of States.

(2) Special agencies should be envisaged with respect to such matters as:

(a) The size and type of armaments, and the manufacture of arms and ammunition.
(b) International trade.
(c) Production and distribution of food and raw materials.
(d) International finance and investments.
(e) International transport, and particularly aerial transport.
(f) International communications.
(g) Welfare of dependent peoples.
(h) Public health.
(i) International traffic in narcotics and dangerous drugs.
(j) Population problems, including international migration.
(k) Cultural and scientific interchange.

PROPOSAL 12

The Permanent Court of International Justice should be maintained as the chief judicial organ of the Community of States, and its Statute should be adapted to the organization of the Community of States.

PROPOSAL 13

The Permanent Court of Arbitration should be maintained as an agency of the Community of States, and all States should be permitted to accede to the Hague Convention on the Pacific Settlement of International Disputes of October 18, 1907.

PROPOSAL 14

The International Labor Organization should be maintained as an agency of the Community of States, and its Constitution should be adapted to the organization of the Community of States.

PROPOSAL 15

Various existing international unions should be maintained as agencies of the Community of States, including the Universal Postal Union, the International Telecommunication Union, and others of proved usefulness.

PROPOSAL 16

A General Secretariat, whose members should be independent of control by the States of which they are nationals, should be maintained to serve the needs of the General Assembly, the Executive Council, and the various agencies of the Community of States.

II. INTERNATIONAL DISPUTES

PROPOSAL 17

(1) The Permanent Court of International Justice should have jurisdiction over all disputes in which States are in conflict as to their respective legal rights and which are not pending before the Executive Council, such jurisdiction to be exercised upon an application by any party to the dispute. If the parties to a dispute have agreed upon another method of pacific settlement, the application to the Court should be possible only after the failure of the method agreed upon.

(2) The Court should be competent to decide any question as to its jurisdiction. Its decision of any such question and its judgment on the merits should be binding upon the parties to the dispute.

(3) In the event of a failure by any State to comply with a judgment of the Court, the Executive Council should have power to take such action as it may deem to be necessary for giving effect to the judgment. If the State which has failed to comply with a judgment of the Court is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

PROPOSAL 18

(1) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of any dispute between two or more States which is not pending before the Permanent Court of International Justice.

(2) The Executive Council should have power to take such measures as it may deem to be necessary for preventing an aggravation or extension of the dispute; and, by majority vote, to request an advisory opinion of the

Permanent Court of International Justice on any legal question connected with the dispute.

(3) If its effort to bring about a settlement of the dispute by the agreement of the parties is not successful, the Executive Council should have power, by unanimous vote, to give a decision which will be binding on the parties; failing such a decision, it should have power, by majority vote, to adopt and publish a report containing a statement of the facts and the recommendations deemed to be just and proper in regard thereto.

(4) If a party to the dispute is represented in the Council, it should not be entitled to vote when the dispute is under consideration.

III. TREATIES AND PEACEFUL CHANGE

PROPOSAL 19

Every treaty or international engagement entered into by any State should be required to be registered with the General Secretariat upon its entry into force. The texts of all treaties or engagements registered should be published by the General Secretariat.

PROPOSAL 20

Upon application by any party to the treaty or engagement, the Permanent Court of International Justice should have jurisdiction to give a declaratory judgment that an executory treaty or engagement has ceased, in whole or in part, to be binding in the sense of calling for further performance, if it finds that the treaty or engagement was entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated and that this state of facts has essentially changed.

PROPOSAL 21

(1) Acting at the request of any part to the treaty or engagement, the Executive Council should have power, by two-thirds vote and with the concurrence of the General Assembly given by two-thirds vote, to advise the revision by the parties of an executory treaty or engagement which it finds to be not adapted to existing conditions.

(2) If any party fails to collaborate in full good faith in the revision advised by the Executive Council, the Permanent Court of International Justice should have jurisdiction, on application by any other party, to give a declaratory judgment that the treaty or engagement has ceased, in whole or in part, to be binding in the sense of calling for further performance, if it finds that under the existing conditions the treaty or engagement has become unduly onerous to one or more of the parties.

PROPOSAL 22

Acting upon its own initiative or at the request of any State, the Executive Council should have power, by two-thirds vote and with the concurrence of the General Assembly given by two-thirds vote, to advise the reädjustment of any situation the continued existence of which would endanger good understanding between States.

PROPOSAL 23

The General Assembly should have power, by two-thirds vote and with the concurrence of the Executive Council, to amend the international instrument creating the organization of the Community of States, provided that no amendment should become effective if objection is formally expressed within twelve months by as many as States.

POSTULATES FOR THE INTERNATIONAL LAW OF THE FUTURE

These Postulates set forth essential premises of an effective legal order for the world of States. They are intended to indicate the basic conceptions upon which the present statement proceeds, and to furnish a guide to the spirit in which the following Principles and Proposals have been drafted.

POSTULATE 1

The States of the world form a community, and the protection and advancement of the common interests of their peoples require effective organization of the Community of States.

COMMENT

It is to be assumed that the State system which has grown up over a period of several centuries will continue to exist in the future.

Seventy-three States (listed in Appendix I) may be said to have existed in 1937, each enjoying a considerable measure of independence in its relations with the others. Most of these States will doubtless continue to exist in the future, despite changes which may be wrought during the war.

The maintenance of peace and the furtherance of international coöperation have to do, for the most part, with the relations of States. It is chiefly through States that peoples conduct their relations with other peoples. One may conceive of a world community which is not composed, or not exclusively composed, of States. Unofficial contacts between individuals and between groups of individuals in different countries extend into almost every field of human activity, and numerous unofficial associations are maintained to keep such contacts alive and fruitful. Yet the problems which arise in such relations have not the same urgency as those which arise in the relations of States. Most wars are waged by States, and recent changes in the character of warfare have made it impossible for any but powerful States to conduct war efficiently. Moreover, the recent extension of governmental activity in many countries has narrowed the field of private enterprise, and though States and private groups are sometimes associated in international organizations, it is chiefly through inter-governmental action that the consequences of the interdependence of peoples must be faced. In our time peace and the advancement of world-wide human interests are mainly dependent, therefore, upon inter-State relations.

The States of the world have long been considered to form a community, and the description of this community as the Community of States has been frequently employed in the literature of international law. Even before the modern improvements in the means of communication and transportation, peoples had many interests in common and not infrequently the protection of such interests was sought by the common action of a number of States. With the shrinking of the world during the past hundred years, the interests

common to various peoples have multiplied many fold; a community feeling among peoples and an appreciation of their interdependence have become more firmly established; and efforts to meet their common problems by common action have been much more frequent. In consequence, no State in the world any longer desires to be considered as outside the Community of States—even Nepal has ceased to regard itself as a hermit State.

The organization of the Community of States has been developing over a period of almost one hundred years. In the middle of the nineteenth century it began to be recognized that the protection of peoples' common interests called for continuous organized effort. Improvements in means of communication and transportation had given rise to problems which could not be met by one State acting alone, or even by a few States acting in concert. Unions of States were formed for special purposes, and in time some of them came to embrace most of the States of the world (see Appendix II). The International Telegraphic Union, founded in 1865 and reorganized as the International Telecommunication Union in 1932, includes sixty-eight States; the Universal Postal Union, organized in 1874, united various countries as "a single postal territory" and more than seventy States are included in its membership. Official unions were created for numerous other purposes—as examples, a European union for international transport by rail, a union for standardizing weights and measures, a union for the protection of industrial property, a copyright union, and a union for the publication of customs tariffs, may be mentioned. In 1905, the International Institute of Agriculture was established. The International Office of Public Health has functioned since 1907. The United States of America currently participates in the work of some fifty international bodies.

Nor has organized coöperation been confined to technical fields. In 1889, the republics of the western hemisphere organized the International Union of American Republics, which has had a fruitful history throughout the years. In 1899, a series of Peace Conferences was inaugurated at The Hague, and that city has continued to serve as a center for efforts devoted to the development of international law. In 1919, the League of Nations was founded. Sixty-three States eventually became members of the League, and almost all of the States of the world have participated in some measure in its work over a period of twenty years. The efforts "to achieve international peace and security" through the League were attended with success in some notable instances, but in the general world situation which prevailed after 1931 they were balked by the secession and defiance of certain large States which were seeking territorial aggrandizement. On the other hand, the efforts "to promote international coöperation" through the League achieved such remarkable results that one may say, as the Secretary of State of the United States declared in a letter to the Secretary-General on February 2, 1939, "the League has been responsible for the development of mutual exchange and discussion of ideas and methods to a greater extent and in more fields of

humanitarian and scientific endeavor than any other organization in history." The International Labor Organization, which began its work in 1919, has numbered sixty-four States in its membership, and with the cooperation of employers and workers it has produced in twenty years a great volume of international legislation. The Permanent Court of International Justice, which opened its doors in 1922, has functioned with the support of more than fifty States, and its handling of the sixty disputes which came before it over a period of eighteen years produced, in most of the cases at any rate, a very general satisfaction.

This brief sketch of a hundred years of history indicates appreciation of the need for a common approach to the problems of the modern world. No people today wishes to lead its life without enjoying advantages which are possible only if contributions by other peoples can be drawn upon, without trade beyond its frontiers, without availing itself of the fruits of scientific endeavor, or without contact with other cultures. Even if it wished, no people is any longer able to supply all that is needed for its own wants. A complete autarchy is impossible for any country. The common interests of peoples, their interest in peace and in the efficacy of daily effort, oblige them to work together through established agencies, and the protection and advancement of their interests require effective organization of the Community of States.

POSTULATE 2

The law of the Community of States is international law. The development of an adequate system of international law depends upon continuous collaboration by States to promote the common welfare of all peoples and to maintain just and peaceful relations between all States.

COMMENT

Western and even European in origin, international law was long conceived to be a law for Christian States, the law of the family of Christian nations. During the course of the nineteenth century, however, the wider intercourse of peoples led to the abandonment of that limitation, and today it is universally admitted to apply, as the Permanent Court of International Justice has said, "between all nations belonging to the community of States." It is, indeed, the law of the Community of States.

International law embodies the rules and principles established by international legislation, by international judicial decisions, and by the practice of States.

International legislation, often referred to as conventional law, includes the rules and principles contained in multipartite treaties and conventions, the number of which has greatly increased during the past fifty years. Rules and principles of international law may even become established as a consequence of their embodiment in a great number of bipartite treaties; thus, recent American and British treaties with China refer to "the principles of

international law and practice as reflected in the modern international procedure and in the modern treaties" concluded by the parties with other States. International legislation may also include some of the acts promulgated by organs of the Community of States, to the extent that such organs have been empowered to make dispositions which are binding on States; thus, in the *Mavrommatis Case*, Judge John Bassett Moore referred to the Palestine mandate as being "in a sense a legislative act of the Council" of the League of Nations.

The judicial decisions of international tribunals may also, in some cases, establish rules and principles of international law. All international tribunals are not on the same plane in this regard, however, the decisions of mixed bipartite commissions being obviously of less weight than those of tribunals of a more general character. In the past, few tribunals have had the support of a large number of States, and few have been permitted to function sufficiently continuously to develop a system of case-law; a great advance came with the establishment of the Permanent Court of International Justice. The decisions of national courts too have had influence on the development of international law, but as such courts function subject to national authority their decisions play a secondary rôle and cannot be said to establish rules and principles of law binding upon all States.

The practice of States, evidenced by the pronouncements of executive, diplomatic, and at times judicial agencies, is the basis of the customary international law. Before it can be said to establish a rule or principle of international law, a practice must be concordant and general, and it must be to some extent continuous. The practice of one State or the practice of several States, even though continuous, may not result in establishing rules and principles of international law.

The sources to be drawn upon in finding international law have been stated in the Statute of the Permanent Court of International Justice in the direction to the Court to apply (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States, (2) international custom, as evidence of a general practice accepted as law, (3) the general principles of law recognized by civilized nations, and (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Law cannot exist in a vacuum. It must always be related to the society which it serves. Nor can public law be divorced from political and social movements. International law depends upon, is conditioned by, the general character of international relations. If it is to be an efficient instrument for protecting and advancing the common interests of peoples, if it is to serve adequately the needs of the Community of States, it cannot remain subject to being set aside by States' going to war. Nor is it possible to maintain a stable legal order if the attention of States is not being continuously given to

meeting new conditions and to solving the problems to which they give rise. To be respected, to serve as an instrument of justice and peace, international law must be brought up to date and must be kept up to date in a twentieth century world. It therefore seems essential to the "revitalizing and strengthening of international law" that States collaborate continuously to promote the common welfare of all peoples and to maintain friendly relations between all States.

This has been recognized in the Atlantic Charter in its emphasis on "the fullest collaboration between all nations in the economic field." The collaboration must be even wider, however. It must be so organized that it may extend into all of the fields which may be related to the maintenance of justice and peace. The development of international law must proceed hand in hand with the development of international collaboration.

POSTULATE 3

The conduct of each State in its relations with other States and with the Community of States is subject to international law, and the sovereignty of a State is subject to the limitations of international law.

COMMENT

Generally, within the realm of its internal affairs, each State may exercise its powers without restraint by international law. Nor can it be said that international law applies to all matters which arise in States' external affairs, that is in relations between States; just as municipal law does not cover the entire gamut of relations between individuals, so international law may not be complete enough at any given time to cover the entire range of inter-State relations.

It was recognized in the Covenant of the League of Nations that some disputes between States may relate to matters which lie "solely within the domestic jurisdiction" of a State, or as it is put in the French version, which are left by international law to the exclusive jurisdiction of a State; but in the case relating to *Nationality Decrees in Tunis and Morocco*, the Permanent Court of International Justice declared that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question," depending upon "the development of international relations."

The conception of a Community of States involves the supremacy of international law in inter-State relations. All conduct of States in their relations with other States is subject to being regulated by international law, hence subject to the applicable law.

A State may have relations with the collectivity of the States which form the Community of States. It may owe duties to the Community, such as a duty to refrain from starting a war; and it may have rights which the Community is bound to respect, such as the right of existence. International

law regulates not only relations between States, but also the relations of each State with the whole Community. To the extent that it pertains to the competence, functions and procedure of agencies of the Community of States, and governs the relations of such agencies with States, it may be proper to speak of constitutional international law.

In the past, emphasis has too frequently been placed on sovereignty in connection with the application of international law. States have often asserted their will without regard for any legal limitations; they have sometimes endeavored to impose their will on others, and have even denied the existence of any Community interest in their relations with other States. Such action by States is a negation of the Community of States and of all international legal order. Its result has been to retard the development of international law, and to frustrate the attempted extension of organized effort. No concept of sovereignty can be acceptable which leads to such a result.

States living in a Community of States are sovereign, can be guided by their own will, only within the limitations of the Community law. As it was put by Judge Anzilotti of the Permanent Court of International Justice, in the case relating to the *Austro-German Customs Regime,* sovereignty can mean only "that the State has over it no other authority than that of international law." Exaggerated claims of sovereignty are so frequently made in international dealings that it seems desirable to include such a statement in the Postulate, though it may seem to be only a deduction from the subjection of inter-State relations to international law.

POSTULATE 4

Any failure by a State to carry out its obligations under international law is a matter of concern to the Community of States.

COMMENT

Since international law is the law of the Community of States, the Community has an interest in its observance and in its integrity. The rights conferred by international law, and the duties which it imposes, are not merely the concern of the two or more States directly involved in a given situation. In many situations a State may dispose of its rights, and thereby relieve another State of correlative duties, without infringing upon Community interests. Yet the Community of States must always be in a position to deal with any situation which jeopardizes good understanding between States, and any failure by a State to perform the duties imposed upon it by international law may call for such action.

The existence of a community interest in the observance of international obligations has frequently been recognized in the past. Certain treaties have been said, for example, to have created European or general law, and they were therefore regarded as having an interest for European States not parties. In 1872, in appealing on behalf of the Jews in Moldavia and

Wallachia, the United States of America relied upon a treaty between European States to which it was not a party, because of the "cosmopolitan character" of the treaty. In 1920, the Committee of Jurists which dealt with the Aaland Islands dispute declared that provisions in the Convention of 1856 between France, Great Britain and Russia had been "laid down in European interests," and that the Convention had a "European character" and was intended to create "European law."

The International (Inter-American) Commission of Jurists, which met at Rio de Janeiro in 1927, proposed as one of the fundamental bases of international law that "States, even though not directly injured, have the right to protest against violations of international law"; and the Inter-American Juridical Committee has recently recommended a declaration that "nations have a common and joint obligation to watch over the observance of the fundamental principles of international law."

The Postulate is limited to an assertion of the Community interest and of the possibility of interposition by the Community to protect that interest. It merely lays the foundation for a protection of the Community interest in a proper case. It does not mean that agencies of the Community of States would interpose in every case in which the conduct of a State is found to be contrary to legal imperatives. Some cases might be trivial, and others might not be thought to call for any action. Each situation would have to be appreciated on its facts, and no attempt can be made to forecast what the wisdom of the time may dictate. Procedures would need to be established for determining that a State has failed to carry out its obligations under international law, and that interposition by the Community of States is desirable. The Postulate does not specify the nature of the action to be taken in the course of such interposition.

POSTULATE 5

Any use of force or any threat to use force by a State in its relations with another State is a matter of concern to the Community of States.

COMMENT

It is only in quite recent years that international law has begun to grapple with the use of force by States. For centuries States felt themselves free to go to war when they pleased for reasons satisfactory to themselves. In doing so, they usually conceived of themselves as exercising a "right to take such action as they shall consider necessary for the maintenance of right and justice." On certain conditions, this "right" was "reserved" by Members of the League of Nations in the Covenant. The "right" was not conferred on States by international law; yet despite occasional efforts to distinguish between just and unjust wars, international law did not forbid such "action".

In former times, if one State went to war against another, its action was commonly regarded as a matter of concern to the States involved and to them

alone. Quite different is the attitude which has grown up in the twentieth century. The Covenant of the League of Nations declared that "any war or any threat of war, whether immediately affecting any of the Members of the League or not is a matter of concern to the whole League." This was a clear recognition of the Community interest in any war or threat of war; and though it ran counter to a general attitude which had prevailed for centuries, the recognition was accepted by the sixty-three States which joined the League of Nations, and in repeated declarations by the Secretary of State of the United States it was made a cornerstone of the policy of the United States of America which did not join the League of Nations. In 1937, numerous Governments united with the Government of the United States of America in declaring that "any situation in which armed hostilities are in progress or are threatened is a situation wherein rights and interests of all nations either are or may be seriously affected." More recently an Under-Secretary of State of the United States has urged a recognition by all States that a "threat of war anywhere throughout the globe threatens their own security."

The Postulate refers to the situation created by any use of force, or any threat to use force, rather than to the situation created by "any war or threat of war." The historic conception of "war" has become bogged in a morass of distinctions which have grown out of attempted definitions of "war," and it tends to obscure the real danger which is the use of force. Only the use or threat of force by a State in its relations with another State is covered, for an employment of force by a State to maintain order within its own territory is outside the present purview.

The force envisaged is physical, armed force; other forms of pressure employed by one State against another may be disturbing to a legal order maintained by the Community of States, but they involve consideration of so many factors that they cannot be covered by a general statement.

The Postulate is limited to the assertion of a community interest in any situation in which force is used, or a threat to use force is made, by one State against another. That interest may lead to interposition by the Community of States to protect itself. Clearly it would be necessary to maintain proper procedures by which it may be established that force has been used or its use threatened by a State, before interposition by the Community of States would be undertaken.

POSTULATE 6

The maintenance of just and peaceful relations between States requires orderly procedures by which international situations can be readjusted as need arises.

COMMENT

The history of international relations is a history of continuous change and of efforts to meet new conditions.

In former times, treaties between States frequently stipulated that their provisions should be "perpetual"; *e.g.*, the treaty between the United States of America and France in 1778. The earliest treaties between the United States of America and Great Britain followed a style of the day in providing for a "perpetual peace." More recent treaties are usually concluded for fixed periods of years. The conventions drawn up by the International Labor Conferences all provide for a periodical consideration of the need for their revision.

Notable changes in historic treaty situations have frequently been made by the agreement of the interested States. A striking example was the superseding of the American-British Convention of April 19, 1850 by the Treaty of November 18, 1901, with reference to the construction of a canal to connect the Atlantic and Pacific Oceans. Significant changes were effected in quite recent years—in 1936 by the Montreux Convention on the Regime of the Straits, in 1937 by the Montreux Convention on Abolition of Capitulations in Egypt and by the exchanges of notes relating to house-taxes in Japan, and in 1943 by bipartite treaties abrogating extraterritoriality in China.

Stability is an important factor in international relations, yet it is attainable only if new conditions can be faced as they arise. Orderly procedures for the readjustments which may be needed seem to be essential if friendly relations are to be maintained between all States, and such procedures cannot be left to wait upon the free concurrence of the interested States. The statement of fundamental principles of international policy which was made by the Government of the United States of America and approved by numerous other Governments in 1937, emphasized both "the sanctity of treaties" and the importance of their modification "when need therefor arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation."

PRINCIPLES FOR THE INTERNATIONAL LAW OF THE FUTURE

This statement of Principles is presented as a draft of a declaration concerning the international law of the future, which is suggested for promulgation by the statesmen who will build the future peace. Numerous precedents for such an official declaration might be cited, but it will suffice to refer to a few examples.

In 1815 the Congress of Vienna was not content to confine itself to current problems in the situation which followed the Napoleonic wars. Two important declarations were annexed to the Act of the Congress, one dealing with the free navigation of rivers, and the other dealing with the rank of diplomatic agents; each of these declarations exercised a formative influence on international law for more than a century. The Congress of Vienna also assumed to act in behalf of all Governments in promulgating a declaration with reference to the universal abolition of traffic in African slaves. In 1856, the Conference of Paris which reëstablished peace after the close of the Crimean War promulgated a declaration on maritime law which has since come to be a generally accepted formulation.

At the Paris Peace Conference in 1919, a declaration of "Fundamental Principles of Justice and Rules of Law" was proposed in the American Commission to Negotiate Peace as a preamble to the treaty of peace; and it was in part due to American initiative that the Treaty of Versailles contained a significant declaration concerning "methods and principles for regulating labor conditions," to "guide the policy of the League of Nations."

The 1922 Washington Conference on Naval Armaments adopted a declaration of rules concerning the use of gases in warfare to form "a part of international law binding alike the conscience and practice of nations," and forty-one States accepted the declaration as it was later embodied in a Geneva Protocol of 1925.

An important "Declaration of American Principles" was adopted by the Eighth International Conference of American States at Lima in 1938, and a declaration on "Fundamental Principles of International Law" was recommended by the Inter-American Juridical Committee in 1942. Many unofficial declarations have been formulated in the past, also, a notable example being the "Declaration of the Rights and Duties of States" proposed by the American Institute of International Law in 1916.

The Principles are confined to the legal order of the future. They do not purport to state the preëxisting law, though some of the duties stated may be said to have existed under the international law of the past. The duties of States are described in each case as legal duties. The proposed declaration would invest them with the character of duties under general international law.

A principle of law, promulgated and accepted as such, may serve as a useful guide for conduct, it may furnish a standard for the appraisal of conduct,

even without any attempt to ordain the consequences of its non-observance. A failure by a State to perform a legal duty is a matter of concern to the Community of States, and it may call for interposition to protect the interests of the Community of States. Yet action taken on behalf of the Community of States should be taken for protective and not for punitive purposes, and it should be entrusted to bodies endowed with judgment and discretion. The later Proposals contain suggestions for implementing the Principles, covering the creation of the necessary agencies and the powers with which they should be invested.

PRINCIPLE 1

Each State has a legal duty to carry out in full good faith its obligations under international law, and it may not invoke limitations contained in its own constitution or laws as an excuse for a failure to perform this duty.

COMMENT

Underlying the modern international law is the principle that States must carry out their legal obligations in full good faith. Without it, States could not live together in a Community of States. Good faith is "the great moral ligament which binds together" the States of the world in a system of law.

Each State is free to determine the nature of its own government, and it is free to develop its own institutions in conformity with the genius of its people. The international law of the future must safeguard this freedom which every State should enjoy. The Atlantic Charter therefore proclaims "the right of all peoples to choose the form of government under which they will live." Yet it is a right to be exercised with due regard for the interests of the Community of States, and each State has a duty to organize its institutions in such a way that it will be in a position to perform its obligations under international law.

Failure by a State to perform its obligations can never be justified by invoking limitations which it has imposed upon itself by its own constitution or laws. Some fifty years ago, in correspondence with Mexico relating to the *Cutting Case*, the Government of the United States declared that "if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties." On several occasions, the Permanent Court of International Justice has declared that "a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force"; indeed it has gone further and stated the principle to be "self-evident" that "a State which has contracted

valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken." At the Conference on Codification of International Law held at The Hague in 1930, the principle was generally accepted that "a State cannot avoid international responsibility [for an injury to an alien] by invoking its municipal law."

No particular distribution of power within a State's governmental system is required. In a federal State, no particular division of power between the federal and local governments is prescribed, and in neither a federal nor a unitary State is interference involved with the separation of legislative, executive and judicial powers. Yet it is essential that by some arrangement of its governmental system each State, whatever the structure of its government, should maintain itself in a position to carry out its international obligations, and a failure to place itself in that position will not excuse its non-performance of those obligations.

The enunciation of the Principle would seem to be particularly important at the present time. Recent challenges to accepted philosophies of government as well as dislocations caused by war may lead to the revision of the constitutions of many States, and extensive shifts of governmental power, both internal and external, are to be anticipated.

PRINCIPLE 2

Each State has a legal duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind.

COMMENT

International law is principally concerned with relations between States. Generally, it does not deal with relations between a State and its own people. So important are the local considerations which shape those relations, so difficult is the appreciation of them by other peoples, that each State must be permitted to order them without external interference. Yet this precept of State freedom cannot be absolute.

A State cannot be free to permit conditions to prevail within its own territory which menace international peace and order, and it cannot be free to treat any part of its population in such a way as to produce that menace. Living as a good neighbor in a Community of States, it may be called upon to place its own house in order. "The right of self-determination," as the President of the United States of America has declared, "does not carry with it the right of any government to commit wholesale murder or the right to make slaves of its own people."

Not infrequently in the past, conditions prevailing in one part of the world have been so violative of the dictates of humanity and justice and so shock-

ing to the conscience of mankind, that peoples generally have been unwilling to tolerate them. During the course of the nineteenth century, trade in African slaves came to be generally condemned, and Conferences of States at Berlin in 1885, at Brussels in 1890, and at St. Germain in 1919, devoted their efforts to its suppression. Slavery in any part of the world has come to be regarded as inimical to a world standard of humanity. This was evidenced by the enquiries made when Ethiopia was admitted to the League of Nations in 1923; by the Slavery Convention of 1926 in which the parties undertook "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms"; and by the Forced Labor Convention of 1930 in which the parties undertook "to suppress the use of forced or compulsory labor in all its forms within the shortest possible period."

Instances are numerous in which States have assumed international obligations with respect to the treatment of their own nationals. Such obligations have often been included in treaties dealing with the transfer of territory. In a treaty with Spain in 1898, the United States of America undertook to assure to the inhabitants of certain relinquished or ceded territories "the free exercise of their religion." The treaties made in 1919 and 1920 for the protection of racial, linguistic and religious minorities in certain European States are outstanding examples; if these treaties are to be explained as consequences of the creation of new States or of accretions of territory, it is to be noted that similar obligations were also assumed by certain States upon their admission to membership in the League of Nations. The underlying principle has been expressed in a declaration by the Eighth International Conference of American States in 1938 that "any persecution on account of racial or religious motives which makes it impossible for a group of human beings to live decently, is contrary to the political and juridical systems of America."

Nor is the protection of minorities an isolated example. The labor charter in the Treaty of Versailles declared that "the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries."

The Principle would require of each State a minimum protection of its own population, that is of all inhabitants of its territory. International law has long prescribed standards for a State's protection of aliens within its territory. Nationals too should have the benefit of the standard which the dictates of humanity and justice impose. In some instances in the past, States have withheld their nationality from groups of their population in order to justify a special treatment which fell short of a general standard; hence the Principle is not confined to the treatment of nationals, but extends to the treatment of all elements of a State's population.

The standard of conduct to be required of each State can be defined only in general terms. Modern civilization has proceeded upon the possibility of laying down some criteria which are of universal acceptance. The 1907 Hague Convention on laws and customs of war on land refers to the "laws of

humanity" and the "dictates of the public conscience." In 1937, the Council of the League of Nations adopted a resolution concerning conditions in Spain, in which it noted "that attacks have taken place in violation of the most elementary dictates of humanity underlying the established rules of international law," and declared that such attacks were "repugnant to the conscience of the civilized nations." Precedent is therefore not lacking for including in the Principle the standard of "the dictates of humanity" and "the conscience of mankind."

The enunciation of this Principle seems particularly important at the present time, when shocking efforts are being made in more than one part of the world to exterminate whole groups of human beings. It is important, also, because new situations have arisen which will require attention to be given to the future welfare of certain dependent peoples, and the world must be assured that such atrocities as the decimation of the Herreros in Southwest Africa forty years ago are not to be repeated. The dictates of humanity and justice must serve as a cornerstone of any permanent world order. They should serve to indicate a general standard of conduct to which each State has a duty to conform, and from which any departure is to be judged by the whole Community of States; but they are not to be used as an excuse for intervention by any State, acting on its own authority, in the affairs of another State.

PRINCIPLE 3

Each State has a legal duty to refrain from intervention in the internal affairs of any other State.

COMMENT

It is a corollary of the general precept that each of the States which form the Community of States must be responsible for the conduct of its own household, that in its internal affairs each State must be free from interference by other States acting on their own authority.

Instances have not been rare in the past in which a powerful State has sought to impose its will on a less powerful State in the latter's disposition of its own economy, and the fear engendered by such action has been a disturbing factor in relations between many States. Such interference became so frequent that efforts were made to justify it by tentatives of law permitting intervention, and these tentatives even derived a semblance of authority from an award of a tribunal of the Permanent Court of Arbitration in the *Venezuela Preferential Claims Case.*

Some of the American States which had been the victims of such interference have long urged its emphatic condemnation, and their efforts led to the inclusion in the Convention on Rights and Duties of States, adopted at Montevideo in 1933, of a provision that "no State has a right to intervene in the internal or external affairs of another State." That Convention, ratified

by sixteen American States, has been supplemented by a Protocol adopted at Buenos Aires in 1936, and by the Declaration of American Principles adopted at Lima in 1938, both of which reaffirmed the principle. To the extent that such provisions apply to intervention in external affairs, they are to be understood to forbid any attempt by one State, acting on its own authority, to control relations between other States. They do not seek to prevent a State's asserting an interest in a matter which other States may have under discussion. Nor do they prevent an effort by the Community of States to protect a community interest in relations between two States, such as the interest in peace which nineteen American States sought to protect by the declaration of August 3, 1932, with reference to the Chaco dispute between Bolivia and Paraguay.

Escape from the dangers of intervention has also been sought by States in other parts of the world. In declarations attached to the Conventions defining Aggression, of July 3 and 4, 1933, the Soviet Union and its neighbors declared that no act of aggression as defined could be justified on the ground of "the internal condition of a State, for example: its political, economic or social structure; alleged defects in its administration; disturbances due to strikes, revolutions, counter-revolutions, or civil war." In 1933 the United States of America and the Soviet Union entered into an agreement by which each undertook "to refrain from interfering in any manner in the internal affairs" of the other. The 1937 Brussels Conference declared that "there exists no warrant in law for the use of armed force by any country for the purpose of intervening in the internal regime of another country." Quite recently, also, in the 1942 Treaty of Mutual Assistance, Great Britain and the Soviet Union pledged themselves to act in accordance with the principle of "non-interference in the internal affairs of other States."

The Principle would reaffirm a precept of the existing law. It would condemn any State's acting on its own authority to intervene in the internal affairs of another State. It would not preclude action taken on behalf of the Community of States and with the mandate of a competent agency of the Community of States, in the event that conditions prevailing in a State's territory should be found to menace international peace and order.

Enunciation of the Principle at the present time would not only be in accordance with the trend of world opinion. It would furnish a needed guarantee to smaller States that the world of the future will be a world in which they can live according to their own aspirations and remain unmolested. It would generalize the declaration made by the Ministers of Foreign Affairs of the American Republics, at their meeting at Rio de Janeiro in 1942, that "the principle that international conduct must be inspired by the policy of the good neighbor is a norm of international law of the American Continent."

PRINCIPLE 4

Each State has a legal duty to prevent the organization within its territory of activities calculated to foment civil strife in the territory of any other State.

COMMENT

If States are to live together as good neighbors in the Community of States, it is not enough that they be obligated to refrain from official intervention in the internal affairs of other States. It is necessary, also, that each State be assured of its internal security, free from subversive influence due to non-official activities in other States. Governments themselves must refrain from participation in the internal political contests to which other Governments are subjected. But they should do more. They should see that activities are not organized within their territory which are calculated to foment civil strife in the territory of other States.

The foundations of this Principle may be traced to the action taken by States throughout the nineteenth century to prevent the organization in their territory of filibustering expeditions designed to operate in the territory of other States. In some States national legislation was enacted to prevent armed preparations or enlistment for waging civil strife in the territory of other States; in the United States of America, for example, such legislation has existed since 1794, and it was framed to carry out what was conceived to be an obligation of international law.

Recent international legislation has given precision to the obligation. An agreement concluded in 1911 between five South American States—Bolivia, Colombia, Ecuador, Peru, and Venezuela—required the parties to "take suitable steps to prevent at all times, in the territory under their jurisdiction, the promotion of revolutions, attempts to raise levies or preparations for the despatch of expeditions, and the execution of any of these acts to the prejudice" of any other party. Thirteen American States became parties to the 1928 Habana Convention on Civil Strife, by which they obligated themselves "to use all means at their disposal to prevent the inhabitants of their territory, national or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife." A similar obligation was proclaimed by Central American States in treaties of 1907, 1923 and 1934, by States of the Near East in the Saadabad Pact of 1937, and by the Ministers of Foreign Affairs of the American Republics in the Final Act of the Habana Conference in 1940.

Efforts to extend the principle have been proceeding in recent years. Some of them have taken the form of bipartite agreements between States. For example, in 1933 the United States of America and the Soviet Union entered into an agreement by which each undertook "not to permit the forma-

tion or residence on its territory of any organization or group . . . which has as its aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in the political or social order" of the other. Similar agreements were made by the Soviet Union with other States.

Newer means of communication call for attention in this connection. The advent of the radio has brought in new possibilities of disturbances in the political life of peoples, and as recent experience has shown propaganda broadcast from the territory of one State to people living in the territory of another State may be as effective in fomenting political strife as the despatch of armed ships and armed forces. Two significant efforts have been made to cope with this problem by international legislation. The 1936 Geneva Convention on the Use of Broadcasting in the Cause of Peace, to which twenty-one States became parties, obligates these States to prohibit "the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory" of another State which is also a party to the Convention. In the 1937 Geneva Convention on the Prevention of Terrorism, it was reaffirmed as a principle of international law that "it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape."

It will be understood that the Principle is not to be applied in such a way as to obligate any State to curb the activities of individuals in the exercise of personal liberties accorded by law. Freedom of speech is one of man's most prized possessions, and it can be protected only if individuals remain free to criticize the Government of their own or of any other country. Nor should the Principle be applied in such a way as to prevent a State from giving asylum and hospitality to individual apostles of freedom who may be fleeing from tyranny in other lands. It is the organization of activities which should be prevented, and the Principle has no application unless the organized activities are of such a character that they must be said to be, objectively as well as subjectively, calculated to foment civil strife in other countries.

The enunciation of this Principle at this time would serve as an assurance to States of the security of their own institutions, social as well as political, especially to those States which by recent events have been placed in special need of that assurance. It seems significant in this connection that when it declared, on the occasion of the murder of King Alexander and M. Barthou at Marseilles in 1934, that "it is the duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose," the Council of the League of Nations linked its action with the obligation of Members of the League of Nations "to respect the territorial integrity and the existing political independence of the other Members."

PRINCIPLE 5

Each State has a legal duty to coöperate with other States in establishing and maintaining agencies of the Community of States for dealing with matters of concern to the Community, and to collaborate in the work of such agencies.

COMMENT

Matters which are of concern to the Community of States must be dealt with by agencies empowered to deliberate and act on behalf of the Community. As the creation and maintenance of such agencies must be effected by the States which form the Community of States, a failure of any State to coöperate in creating or maintaining them, or in collaborating in their work, would mean a crippling of the Community itself. Progress in building a world order on secure legal foundations is conditioned upon such cooperation and collaboration. For this reason, the Inter-American Juridical Committee has recently declared that "no nation is privileged to remain aloof from the organization of the international community"; and the Ministers of Foreign Affairs of the American Republics, meeting at Habana in 1940, pledged their Governments to "coördinate their own interests with the duties of universal coöperation."

The imposition of a legal duty on States to meet this necessity is more than a pious aspiration. While it is not possible to state in advance precisely the steps which any State ought to take, it can be affirmed as a principle of law that States may not ignore the agencies of the Community of States, and that they have a positive legal duty to take part in the common effort which will enable the agencies to function toward the ends for which they were created. Precedents are not lacking for a statement of a legal duty in these terms. For example, the abortive Geneva Protocol on Pacific Settlement of International Disputes of 1924 referred to the obligations of certain States as requiring them "to coöperate loyally and effectively in support of the Covenant of the League of Nations and in resistance to any act of aggression."

A useful analogy may be found—here as so often in dealing with inter-State relations—in national efforts to regulate relations between employers and workers. Certain States have not hesitated to impose on employers and workers a duty to negotiate and to engage in collective bargaining; a law of the United States of America, for example, imposes a legal duty on various public carriers and their employees "to exert every reasonable effort to make and maintain agreements" on certain matters. Such duties are rigorously enforced by national courts. Under such laws, the persons on whom reciprocal duties are imposed are not constrained to reach an agreement, and they are not compelled to accede to demands made; yet they cannot lawfully decline to negotiate and their own proposals must be in the spirit of an effort to arrive at an understanding.

Similarly, a State may have a duty to take part in the common effort, to coöperate in maintaining the necessary agencies and to collaborate in their work. It would not be obliged to support any specific proposal which may be advanced, nor to enter into any agreement which in its judgment fails to take account of its special interests. Yet it would not be living up to its duty if it sought to remain entirely aloof and to ignore the common effort.

It is an historical fact that in some fields international coöperation has been well-nigh universal. Of the seventy-three States existing in 1937, seventy-two States have collaborated in the work of the Universal Postal Union; sixty-eight States are parties to the 1932 Telecommunication Convention, and to one or other of the various conventions dealing with the traffic in opium and drugs. Moreover, most of the States of the world—Nepal and Yemen being the chief exceptions—took part in some of the activities of the League of Nations. In 1939, the Secretary of State of the United States of America stated to the Secretary-General of the League of Nations that "the United States Government looks forward to the development and expansion of the League's machinery for dealing with the problems" in the social, economic and financial fields, "and to the participation by all nations in active efforts to solve them."

The Principle does not deal with the method of conducting the coöperation, nor with the specific agencies which must be established. Future developments which cannot be forecast will be controlling, but some specific suggestions are advanced in the later Proposals.

Nor is it possible to enumerate the matters which may be dealt with as matters of concern to the Community of States. Some matters which fall very closely into that category are referred to in these Postulates, Principles, and Proposals. No list of them can be exhaustive. From time to time matters previously left to the exclusive competence of States may, as a result of the development of inter-State relations, become matters of concern to the Community of States. In general, all matters which concern two or more States, which have to do with inter-State relations, must be regarded as potentially matters of concern to the Community of States.

The enunciation of the Principle is needed as a foundation for the better organization of the Community of States. If it involves an extension of international law, the extension is based upon historical development, and it is in line with the necessities of a legal order.

PRINCIPLE 6

Each State has a legal duty to employ pacific means and none but pacific means in seeking to settle its disputes with other States, and failing settlement by other pacific means to accept the settlement of its disputes by the competent agency of the Community of States.

COMMENT

In the past, war was not forbidden as one of the possible means of seeking the settlement of a dispute. A change in the general attitude on this point began to stir in the last century, and it has been formulated and widely accepted in this century.

The principle that only pacific means may be employed for the settlement of disputes has recently been enunciated in two great international instruments, and practically all of the States of the world have become parties to one or the other, or to both, of these instruments. By the Treaty of Paris of August 27, 1928, sixty-three States agreed "that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." By the Treaty of Rio de Janeiro of October 10, 1933, twenty American and eight European States agreed "that the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law."

The Principle requires that pacific means be employed if the settlement of a dispute is sought, but it does not require that a settlement be sought. It happens not infrequently that all of the States engaged in a dispute prefer no settlement to any which appears to be attainable. It is notorious that some international disputes—usually territorial disputes—have been allowed to simmer for generations. From the point of view of the Community of States, it may be more desirable that a settlement should be effected, and this will certainly be true where the dispute is a menace to peace or to the good understanding between States upon which their coöperation depends. The 1933 Montevideo Convention on Rights and Duties of States, to which sixteen American States are parties, provides that "differences of any nature which arise between them should be settled by recognized pacific methods." Yet the primary duty of each State relates not to settling its disputes with other States, but to the means and methods which it may employ in seeking a settlement.

The pacific means available to States for seeking the settlement of disputes are numerous and various. The chief means is direct diplomatic negotiation between the parties, and in fact most disputes are settled by this means. Since 1856, a formal basis has existed for recourse by a disputant State to the good offices of a third State. The law relating to good offices and mediation was codified in the 1899 and 1907 Hague Conventions on the

Pacific Settlement of Disputes, and these conventions are supplemented by an Inter-American Treaty of 1936 to which fifteen States are parties. Numerous States have joined with others in formulating procedures for enquiry and investigation and in establishing permanent commissions of conciliation, and the procedure of arbitration has been elaborated in scores of recent treaties, both multipartite and bipartite. With the creation of the Permanent Court of International Justice, the adjudication of disputes by impartial judges has been placed upon a firm basis. Pacific means are not lacking, therefore, to States which are willing to employ them.

The duty to seek settlement of disputes only by pacific means does not meet the need entirely, however. If one party to a dispute insists upon a settlement, if it is to be bound to refrain from employing non-pacific means to that end, and if the other party does not agree upon a method of dealing with the dispute, an agency of the Community of States must be available to it as a forum, and such agency should be invested with the necessary competence; or if the interests of the Community of States demand that the dispute be settled, an authority should be at hand and competent for that purpose. Hence, the duty to employ only pacific means in seeking settlement of a dispute must be complemented by a duty to accept settlement by a competent authority of the Community of States. The Principle would establish both duties, and Proposals are later made for implementing it.

The parties to a dispute would always remain free to agree upon any method of pacific settlement. It is only when they fail to agree, or when the method upon which they have agreed breaks down without a settlement, that the duty to accept a settlement by the competent authority of the Community of States would be operative.

The Principle goes beyond the obligations embodied in the Covenant of the League of Nations. Under the system of the Covenant, sixty-three States agreed that they would submit to arbitration or judicial settlement disputes which they recognized to be suitable for such submission; that if the dispute was "likely to lead to a rupture," they would "submit the matter either to arbitration or judicial settlement or to enquiry by the Council," and that if the dispute was not submitted to arbitration or judicial settlement and if it was "likely to lead to a rupture," either party might submit it to the Council. If the dispute was submitted to arbitration or judicial settlement, the parties were bound to "carry out in full good faith any award or decision" rendered; if the dispute was submitted to the Council and if a report was unanimously adopted by the Council, though the parties had no obligation to accept the recommendation of the report, all Members of the League covenanted "not to go to war with any party" which complied with the recommendation.

Such remarkable progress has been made during the past quarter-century, both in creating agencies for the pacific settlement of disputes and in building a law relating to pacific settlement, that the time now seems to be ripe

for the enunciation of a clear principle of law that if settlement is not reached by other pacific means, each State must accept the settlement of its disputes by the competent agency of the Community of States.

PRINCIPLE 7

Each State has a legal duty to refrain from any use of force and from any threat to use force in its relations with another State, except as authorized by the competent agency of the Community of States; but subject to immediate reference to and approval by the competent agency of the Community of States, a State may oppose by force an unauthorized use of force made against it by another State.

COMMENT

The maintenance of a peaceful legal order cannot be sufficiently assured by provision for the peaceful settlement of disputes between States. Recent experience has shown that conflicts are possible even when situations have not been formalized as disputes. It seems essential to lay down a broad principle as to the use of force, and to move as far as possible toward the elimination of force as a means to be employed for the attainment of States' objectives. Whatever the situation, no State should be permitted to resort to force to impose its will upon another State. It should be proclaimed as a legal duty of States to refrain from using force, as well as from threats to use it.

The Principle deals with the use of force rather than with war, because of the many artificial distinctions which have grown out of attempts to define war. The force referred to is physical force; this limitation is necessary to the clarity and definiteness with which the duty must be stated. Other forms of pressure, such as discriminations in trade relations, raise complications which cannot easily be encompassed by a simple statement of legal duty, and they may require adjustments which only continuing legislative processes can supply.

It is the use of force by a State in its relations with other States which must be forbidden; the employment of force by a State to suppress an insurrection among its own people, or to quell a riot, or to prevent individuals from resorting to violence, does not ordinarily impinge upon interests of other States, and it does not call into play the authority of the Community of States.

The general principle must be stated with the exception of any use of or threat to use force authorized by the competent agency of the Community of States. Situations may arise in which a use of force will be thought to be necessary for the protection of the interests of the Community of States, and in which it may be entrusted to a State or a group of States by a mandate given by a competent agency of the Community of States. Moreover, in developing the international law which will be applicable, the Community

of States may lay down conditions under which a State's use of force without a special mandate would be authorized.

The statement of the Principle recognizes, also, the necessity of admitting the possibility of a State's using force to oppose an unauthorized use of force against it by another State. When the Treaty of Paris was being negotiated in 1928, reference was made to a "natural right of self-defense," and the renunciation of war "as an instrument of national policy" was made with the understanding that this "right" was not to be affected. The existence of such a "right" has been proclaimed so repeatedly that in the minds of many people it has achieved the status of a legal axiom. Yet the plea of self-defense has been greatly overworked, and in many cases it has been merely specious. In modern times, the psychology of peoples has been such that every war has seemed to all the peoples engaged to be a war in self-defense. Any conception which lends itself to such general misuse must be employed with sparing and discrimination. A blanket exception of self-defense would rob a formulation of the duty to refrain from a use of force of much of its utility. What is necessary is to admit that a State may use force to oppose an unauthorized use of force by another State; but the interests of the Community of States clearly require that any such use of force should be permitted only subject to immediate reference to and approval by the competent agency of the Community of States. If the situation in which a State finds itself called upon to oppose an unauthorized use of force is clear and unmistakable, that State can count upon such approval to legitimate its action; in any other situation, it should refrain from using force, except as authorization may be or may have been given by the competent agency of the Community of States.

A precedent for this provision exists in the 1921 Convention neutralizing the Aaland Islands. This instrument provided that in the event of a sudden attack upon the Aaland Islands Finland should take the necessary measures for checking and repelling the aggressor until the other parties to the Convention could intervene; but in such a case Finland was required to "refer the matter immediately to the Council" of the League of Nations.

The Principle is clearly in line with current thinking about international relations. Two generations ago, a Peace Conference at The Hague deemed it "important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning," and more than forty States became parties to a convention providing that hostilities between them should not "commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." If this provision marked some advance at the time, it was not destined to serve a large rôle in ensuring peace even if the requirement had been complied with; and with the passing of less than two decades effort came to be directed into a different channel. In the Covenant of the League of Nations, "any war or threat of war, whether

immediately affecting any of the Members of the League or not," was "declared a matter of concern to the whole League," that is, to the organized Community of States; and the Members of the League undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." However, the Covenant also provided that in the event that a dispute "likely to lead to a rupture" had been submitted to arbitration or judicial settlement or enquiry by the Council, the Members of the League should not "resort to war until three months after the award of the arbitrator or the judicial decision or the report by the Council"; and after a submission to the Council and its failure to arrive at a unanimous report, the Members of the League reserved to themselves "the right to take such action as they shall consider necessary for the maintenance of right and justice."

Nor were these "gaps in the Covenant" repaired by the Paris Treaty for the Renunciation of War of 1928, in which most of the States of the world joined in a renunciation of war as an instrument of national policy. That step was to a large extent vitiated by a qualification, which had not appeared in the Covenant, that each State had a "right of self-defense," and it was even asserted in the course of the negotiations that each State remained the sole judge of the occasion on which the "right" should be exercised.

The abortive Geneva Protocol on the Pacific Settlement of Disputes of 1924 provided for agreement by the parties not to go to war "except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations."

No substantial progress was made in the Rio de Janeiro Anti-War Treaty of 1933, in which a number of States declared "that they condemn wars of aggression in their mutual relations or in those with other States." A Declaration of American Principles, adopted at Lima in 1938, confined itself to the simple formulation that "the use of force as an instrument of national or international policy is proscribed."

The enunciation of this Principle at the present time would serve as a means of giving effect to the declaration in the Atlantic Charter that "all nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force."

PRINCIPLE 8

Each State has a legal duty to take, in coöperation with other States, such measures as may be prescribed by the competent agency of the Community of States for preventing or suppressing a use of force by any State in its relations with another State.

COMMENT

If States are to give up the freedom which they have exercised in the past to rely upon their own will in the use of force against other States, if they are to refrain from any use of force or any threat to use force in their relations with other States except as authorized by the competent agency of the Community of States, they will need to be assured of protection by the Community. It is obviously impossible to foresee the precise situations in which that protection may be needed, and the assurance would be illusory if a competent agency of the Community of States could not seek to prevent or suppress the unauthorized use of force by a State in its relations with another State. Nor would it serve much purpose to postulate that any use of force or any threat to use force by a State in its relations with another State is a matter of concern to the Community of States, if the Community were powerless to move once the situation had presented itself.

The Principle does not indicate the nature of the action which an agency of the Community of States might be competent to take to that end, nor does it specify the measures which States might be asked to take. Those questions can best be decided as occasions arise, or perhaps in accordance with guides which might be drawn up from time to time. A State might be asked to sever diplomatic relations with a State using or threatening to use force; or it might be asked to discontinue exchanges of goods; or it might be asked to withhold any kind of assistance; or it might be asked to supply military forces, or to permit the passage of such forces across its territory; or it might be asked to take other measures. Nor is it to be assumed that all States would be in the same position with respect to an actual or threatened use of force; measures might be prescribed for a certain State which other States would not be in a position to take. Such matters are not susceptible of a uniform and universal treatment. Yet the duty would rest upon all States, and no State would be free to frustrate the efforts of the Community of States by relying upon the nineteenth-century law of neutrality.

In any case in which measures are prescribed, it would seem desirable that they should be prescribed for more than one State. Action by a single State might be too onerous; or it might prove so tempting that it would get out of hand, with the result that the State would come to be serving its own interests. For these reasons, the Principle is limited to a State's duty to take measures in coöperation with other States.

The Principle represents a departure from the Covenant of the League of Nations. In the event of a resort to war by any Member of the League in disregard of certain obligations, the Covenant provided that it should "*ipso facto* be deemed to have committed an act of war against all other Members of the League," and the Members undertook "immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the national of any other State, whether a Member of the League or not." Moreover, the Council was empowered "in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League," and the Members agreed to "take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are coöperating to protect the covenants of the League." These provisions were weakened by the failure of the Covenant to provide, or by its failure to provide sufficiently clearly, for a common decision that a resort to war in violation of its provisions had taken place, and an amendment formulated in 1921 for clarifying the matter did not become effective. In no case did the Council recommend a use of armed forces "to protect the covenants of the League." The "sanctions" applied against Italy in 1935 were inadequate and for the most part ineffective.

In retrospect, it may be possible to say that the provisions of the Covenant might have been more efficacious if they had been less sweeping. It seems preferable to leave to a competent agency of the Community of States more freedom to consider the differences in resources and geographical position of various States, and more power to determine the quantum and character of the measures to be taken by particular States in situations in which it may determine them to be necessary.

PRINCIPLE 9

Each State has a legal duty to conform to the limitations prescribed by the competent agency of the Community of States and to submit to the supervision and control of such an agency, with respect to the size and type of its armaments.

COMMENT

It would be idle to attempt to eliminate the use of force by States in their relations with other States if at the same time States were left a complete freedom to determine the size and type of the armaments which they will maintain. Nor is it possible to look forward to "a just and enduring peace ensuring order under law to all nations" if any State is to be permitted to

pile up implements with which it may seek to impose its will on other States. Apart from the temptation to make an unauthorized use of such implements, the State which amasses them would come to possess an undue amount of power, and a disturbance of the good understanding necessary for an effective organization of the Community of States would be inevitable.

Efforts to limit armaments by the agreement of the heavily armed States have been proceeding almost continuously since 1899. The failure of the two Peace Conferences at The Hague to make any progress in this direction is notorious. The solemn recognition embodied in the Covenant of the League of Nations that "the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations," remained a dead letter, though it was reinforced by provisions for "plans" and for a permanent commission to advise upon their observance when adopted. Nor have any of the recent conferences on limitation of armaments achieved results of lasting significance. Experience of the past has demonstrated that the disarmament of a defeated State, effected while the victors keep their armaments, can operate as an encouragement to clandestine arming.

A departure must be made if any substantial progress is really desired. It cannot be merely an agreement to scrap certain ships, or to restrict the caliber of guns, or to limit the size of an army corps. It must be more than a ban upon a particular weapon, and more than a community monopoly of a certain raw material. The task of arriving at the limitations to which States should have a duty to conform ought to be facilitated by the recent mechanization of war and by the fact that the newer kind of warfare requires open preparations on a vast scale. It must be realized, however, that an effective limitation of armaments presupposes an adequate system of international organization under which States can feel that their security is assured.

Extensive supervision and control may be required if limitations are to be established and if their observance is to be assured. Of course States will suspect that others are not performing their obligations. The dissemination of complete information concerning the military establishments of States will be essential. In the Covenant of the League of Nations, sixty-three States undertook "to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes, and the condition of such of their industries as are adaptable to warlike purposes." This led to the publication of an "armaments yearbook" which appeared in fifteen volumes from 1924 to 1939, but the information contained was "drawn solely from official and public documents," and no attempt was made to verify the indications of such documents. The 1925 Geneva Convention on Trade in Arms, which failed to enter into force though it was

ratified by seventeen States, contained provisions on "supervision and publicity," but they were limited to a system of licenses and reports.

The need for supervision and control has been appreciated in a striking declaration by an Under-Secretary of State of the United States of America that "the abolition of offensive armaments and the limitation and reduction of defensive armaments and of the tools which make the construction of such armaments possible, can only be undertaken through some rigid form of international supervision and control," and that "without such practical and essential control no real disarmament can ever be achieved."

PRINCIPLE 10

Each State has a legal duty to refrain from entering into any agreement with another State, the performance of which would be inconsistent with the discharge of its duties under general international law.

COMMENT

States have a wide freedom to enter into agreements for meeting their common problems, and it is a freedom which must be safeguarded. Yet all agreements between States depend for their binding force on international law, and the interests of the whole Community of States require that the general international law take precedence over agreements between pairs or small groups of States. The legal duties imposed upon a State by general international law must be performed in any event, and it would seem to follow as a corollary that no State should enter into any agreement by which it would assume obligations the performance of which would be inconsistent with the general law.

A precedent is to be found in the Covenant of the League of Nations, designed to be general law for the sixty-three States which became Members of the League. The Covenant was accepted as "abrogating all obligations or understandings" inconsistent with its terms, and the Members agreed that they would not thereafter "enter into any engagements inconsistent with the terms thereof."

Enunciation of this Principle would serve not only to assure the better observance of the duties imposed by the international law of the future, but also to bolster the numerous multipartite conventions which constitute the body of the world's statute law. Too frequently in the past such conventions have been restricted in their operation by inconsistent agreements between some of the parties.

PROPOSALS FOR THE INTERNATIONAL LAW OF THE FUTURE

These Proposals are offered as indications of measures which might be adopted to make the organization of the Community of States effective, and to assure the continuous collaboration of States to promote the common welfare of all peoples and to maintain friendly relations between all States. They are intended to point out ways for implementing a declaration of the preceding Principles, but they are not presented as draft provisions for inclusion in an international instrument.

In line with authoritative declarations made on behalf of peoples who desire "a just and enduring world peace securing order under law to all nations," suggestions are advanced as to possible and desirable approaches to be made toward the solution of legal problems connected with the maintenance of a permanent world order. Solution of many of these problems cannot be reached once and for all. Whatever the solution attempted, the problems will recur. For this reason the suggestions are confined to the agencies and methods and procedures by which such problems can be faced in any permanent system.

No attempt has been made to anticipate solutions which may have to be given to the immediate problems with which the world will be faced when present hostilities have been ended. The importance of those problems cannot be minimized, but solutions of them will depend upon numerous political decisions to be taken in situations which cannot be foreseen.

I. ORGANIZATION OF THE COMMUNITY OF STATES

PROPOSAL 1

(1) The Community of States should be organized on a universal basis. All States which exist or which may come into existence in the future should be included. No provision should be made for the expulsion or withdrawal of any State.

(2) The organization of the Community of States on a universal basis should not preclude the organization of groups of States on the basis of regional propinquity, historical relationship, or mutuality of interest, for purposes not inconsistent with those of the universal organization. The activities of agencies of such groups of States should be coördinated with the activities of the agencies of the Community of States.

COMMENT

If the Community of States is to protect and advance the interests of all peoples, if it is to proscribe the use of force by any State, if its agencies are to be enabled to function with a world-wide authority, it must be organized on a universal basis. All States in the Community of States, all States to which international law applies, must be included in the organization.

If the organization of the Community of States is to be effective, if it is to have a prospect of permanence, it must be enabled to continue on a uni-

versal basis. Hence, no provision should be made for the withdrawal of any State, and no expulsion of a State should be possible.

An international organization which is not universal, which though it includes many States excludes others, would not only be less effective; it would also encounter grave risks of challenge and opposition. If it includes only States of a certain political or ideological character, the formation of a rival and hostile group would be encouraged. A union of democratic States might find itself confronted by a union of non-democratic States; and recent history has shown that a union of like-minded States of a certain mind may lead to a union of like-minded States of another mind.

Experience in international organization clearly points to the necessity of universality. The founders of the League of Nations seem to have hoped for its development toward universality, but when the League was organized numerous States were not invited to accede to the Covenant—not merely Austria, Bulgaria, Germany, Hungary and Turkey, but also Afghanistan, Costa Rica, Dominican Republic, Luxemburg, Mexico, the Soviet Union and other States. The States named were subsequently admitted to membership, but certain smaller States—Liechentstein, Monaco, and San Marino—were excluded from formal membership. The prospect of universality was further prejudiced by the Covenant's provisions for withdrawal and expulsion; the privilege of withdrawal was effectively exercised by sixteen States, and one State was expelled.

Throughout its history, the efforts of States made through the League of Nations were hampered by the necessity of a distinction between Members and non-Members. League activities in many fields required that the coöperation of non-Member States be enlisted, and frequent diplomatic conferences had to be convoked to this end. Yet progressively the distinction became of less importance, and when a new Central Committee for Economic and Social Questions was projected in 1939, it was urged by the United States of America and recognized by the League Assembly that all States should be permitted to participate in the work of the Committee. The experience of the League of Nations led the Government of the Swiss Confederation to observe, in 1936, that "a League that is not universal is not merely a weaker and less effective institution, but an institution whose character is liable to deteriorate. It may change from a world-wide association for the development and defence of international law into an association of States likely, in the nature of things, to find itself at odds with countries that do not belong to it."

In other organizations, also, the tendency has been toward universality (see Appendix II). The Universal Postal Union, for example, grew from a union of twenty States in 1874 to a union of seventy-two States in 1939.

The Proposal follows the precedent of the Union of American Republics, from which no American Republic has been excluded, none has been expelled, and none has sought to withdraw. It is in line with a recent decla-

ration by the Inter-American Committee of Jurists that "the international community must be organized on the basis of the coöperation of all nations," and that "no nation is privileged to remain aloof from the organization thus established." It would carry out the clear implications of the Atlantic Charter which emphasizes the enjoyment "by all States, great or small, victor or vanquished" of conditions necessary for their economic prosperity, the fullest collaboration "between all nations" in the economic field, a peace from which "all nations" may benefit, and the abandonment of the use of force by "all the nations of the world."

An organization of the Community of States on a universal basis would naturally be competent to deal with any matter of concern to the Community of States. This does not mean that some problems would not have to be dealt with by agencies of special and limited scope, and of course such agencies could be created within the framework of a universal organization. Yet if only a number of special and limited unions were formed, the world would be back in the stage of the fifty years which preceded 1919. As a permanent matter, a general organization will be required for problems which are more than temporary, as well as for the coördination of special activities.

The method to be adopted for realizing this Proposal of an organization of the Community of States on a universal basis cannot be determined in advance. It must depend upon conditions prevailing when the organization is to be launched. It is assumed that at the conclusion of the present war the lodgment of power will be such that the States which desire an effective organization will have the dominant voice, and that other States will be willing, or will feel themselves constrained, to follow the lead. If one or more States should hold aloof, competence might none the less be vested in the organization to act on behalf of the whole Community of States.

Initially, the inclusion of States should be specific, all of the entities existing as States at the time being named. Thereafter, the inclusion of any entity as a State in the organized Community of States should constisute its recognition by all States.

If the conditions existing in certain States at the close of the war should lead to any restrictions on their active participation, it should be realized that the organization would be crippled if such restrictions were more than temporary, and their earliest possible removal should be envisaged.

The organization of the Community of States on a universal basis would not preclude the grouping of certain States for purposes not inconsistent with those of the universal organization. Such a grouping of States might be based upon regional propinquity, upon historical relationship, or upon mutuality of interest.

Numerous regional organizations have existed in recent years. The twenty-one American Republics have been associated since 1889 in the

Union of American Republics, which operates in periodical International Conferences of American States and which maintains a permanent agency in the Pan-American Union. Other regional organizations have been the Little Entente, the Balkan Entente, the Baltic Union, and the Inter-American Union of the Caribbean. Regional groupings of States, less closely organized, have been formed for coöperative purposes, also; *e.g.*, the Scandinavian States, the Bolivarian States, and the States of the River Plate. Historical relationship unites the States which have emerged from the British Empire to form the British Commonwealth of Nations; and mutuality of interest has at times drawn together such groups as the Islamic States, and the Oslo States.

It is desirable that the activities of such groups of States be coördinated with those of the more general organization. Not infrequently general international conventions have been duplicated, and to that extent limited, by conventions drawn up by groups of States.

A useful precedent exists in the field of postal service. The Universal Postal Conventions have long provided that "countries of the Union may maintain and establish restricted unions," if the agreements creating them do not provide for services "less favorable than those laid down in the Acts of the Union"; and several subordinate postal unions—*e.g.*, the African Postal Union and the Postal Union of the Americas and Spain—exist under that provision. A similar situation exists within the framework of the Telecommunication Union.

In the League of Nations, also, regional conferences were held from time to time to deal with special matters; *e.g.*, the American Conferences on double taxation, and the Far Eastern Conferences on health and other social questions. Under the auspices of the general International Labor Organization, the American States have recently held two labor conferences and a conference on social security.

PROPOSAL 2

(1) A General Assembly, in which all States should be entitled to representation, should be established to serve as the general representative and deliberative organ of the Community of States.

(2) The General Assembly, meeting as occasion may require and at least once each year, should have general power to deal with any matter of concern to the Community of States. Except as may be expressly provided otherwise, its decisions should require only a majority vote.

COMMENT

The protection and advancement of the common interests of peoples require an organization which can preserve continuity in its efforts. Merely spasmodic conferences would not suffice. Solutions of international prob-

lems usually require long preparation and repeated discussions, and even when they are arrived at they may not be in any sense final. Continuity is to be achieved only through established institutions, making possible frequent and periodical conferences functioning with the assistance of permanent officials.

The chief of these institutions should be a general representative and deliberative organ, which might be called a General Assembly. Meeting as occasion may require, and at least once each year, it should be empowered to deal with any matter of concern to the Community of States except as special competence may have been committed to another body.

In such a body, each of the States which form the Community of States should be entitled to representation. The number of representatives of each State might be determined by the General Assembly itself, but the representatives of each State should vote as a unit.

Each State should be left free to determine how it will choose its representatives. As the Covenant of the League of Nations entitled each Member to have three representatives in the Assembly, some States habitually included in their delegations representatives chosen from political parties in opposition to the party in power, and the practice had an obvious advantage. Yet conditions in the different States vary so widely that no uniform prescription as to a method of choice would seem to be possible. The matter is one of which each State may be the best judge for itself.

Nor does it seem desirable to provide for the representation in a General Assembly of groups or bodies other than Governments. The effectiveness of such a body would be in direct proportion to the extent to which its decisions are acceptable to States, for in most cases the Governments of States would have the responsibility of executing them. The General Conference of the International Labor Organization is "composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members," and the non-Government delegates must be chosen in agreement with the industrial organizations which are most representative of employers or workpeople in their respective countries. This system serves admirably for the General Conference of the International Labor Organization, yet it would hardly be susceptible of application in a General Assembly in which more extensive powers would be vested.

In a body composed of some seventy States, it would seem to be undesirable to require unanimity before any action could be taken. For most matters, a majority vote should suffice for a decision; for other matters, some of which are referred to in the Proposals, a qualified majority, such as two-thirds, might be required. As a general rule the decisions of the Assembly of the League of Nations on all matters other than questions of procedure and the appointment of committees to investigate particular

matters were required to be unanimous, but in practice certain types of resolutions were adopted by majority vote.

If a majority vote be made sufficient, however, it may be desirable to establish from the outset a system of weighting the votes of States in a General Assembly. The principle of State equality would be recognized in provision for the representation of all States, and in the privilege extended to all States to participate in the consideration of matters of common concern. Yet States vary so widely in size and influence, the responsibilities which they can assume are so disparate, that some distinctions may have to be drawn in the voting power of the States represented. Without such distinctions, it might be necessary so to restrict the powers of a General Assembly as to render it a much less significant body. The principle of State equality does not stand in the way of a recognition of actual differences in fact.

In the past, the practice has usually prevailed in international organizations of giving to each State one vote. That rule has obtained in the Assembly of the League of Nations, and in the International Conferences of American States. Yet there have been notable exceptions to the general rule. In the Congresses of the Universal Postal Union, votes have long been assigned to the dependencies of certain States, so that in fact some States have a number of votes. In some organizations, voting power has been made to depend upon a classification of States. In the 1905 Convention on the International Institute of Agriculture and in the 1907 Arrangement on the International Office of Public Health, a classification was adopted both for voting power and for contributions to the budget.

Any classification of States must rest on a somewhat arbitrary basis. No objective criteria seem to be available which would not lead to artificial results. The factor of population would probably present least difficulty, yet some limitations would be necessary if population were made the sole criterion, or even if the classification were not based on population alone. The amount of a State's contribution to the budget might serve as one of the criteria of its voting power; but too much emphasis on financial capacity would be invidious, and the problem would still remain of finding a barometer for determining that amount. If any classification is to be made, a variety of factors may have to be considered together. Size of population, amount of contribution to the budget, extent of trade and production, and perhaps other factors might be taken into account.

Nor is it necessary that a single system of weighting votes be adopted. It is possible to assign to the vote of a State a value according to one system of weighting and simultaneously a cumulative value according to another system. In 1919, the Swiss Confederation proposed that certain decisions of the Assembly of the League of Nations should require a double majority of votes, a majority on the basis of one vote to each State and a majority weighted in accordance with the size of States' populations. Simi-

larly, the Interstate Compact to Conserve Oil and Gas concluded in 1935 by several states of the United States of America, provides for votes by a double majority of the representatives in the Interstate Oil Compact Commission, prescribing both "the affirmative votes of the majority of the whole number of the compacting states represented," and a "concurring vote of a majority in interest" of such states, the interest to be determined by a ratio of daily average production of oil.

The representation in the General Assembly of diminutive States, for instance of States having a population of less than 100,000, might be thought to raise a special problem in this connection. The effective rôle of such States might be limited to their participation in deliberations; votes of their representatives might be cast but, at any rate for some purposes, not counted.

PROPOSAL 3

(1) An Executive Council, in which States should be entitled to representation, should be established to serve as the general executive organ of the Community of States.

(2) The Executive Council, meeting as occasion may require and at least four times each year, should have general power to deal with any matter of concern to the Community of States. Except as may be expressly provided otherwise, its decisions should be taken by unanimous vote, but decisions with regard to matters of procedure and appointments should require only a majority vote.

COMMENT

A body so large as the proposed General Assembly would not be capable of taking the decisions of immediate application which may be required for the protection and advancement of peoples' common interests. It should be supplemented by a smaller and more flexible body, which could meet more frequently, and which could serve as the general executive organ of the Community of States. Such a body might be called an Executive Council.

Meeting as occasion may require and at least four times each year, the Executive Council should be empowered to deal with any matter of concern to the Community of States, except as special competence may have been committed to another body. Following any directives laid down by the General Assembly, it should have general power to take emergency decisions, to supervise and coördinate the activities of agencies of the Community of States, to keep a watchful eye upon the development of inter-State relations, and to deal with questions of policy not reserved to the General Assembly.

Thus the General Assembly and the Executive Council might both be given general power to deal with any matter of concern to the Community

of States. A sharp demarcation of the fields of action of the two bodies would be undesirable. The experience of the Assembly and Council of the League of Nations, both of which were empowered to deal "with any matter within the sphere of action of the League or affecting the peace of the world," has shown that it is not necessary to anticipate a conflict between the General Assembly and the Executive Council as to their authority.

A decision as to the number of representatives to compose the Executive Council will depend upon the general political situation. On the one hand, it would seem desirable that the number should not be too large for effective conference and for the free exchange of views; on the other hand, it should be large enough to provide for a representation which would assure confidence and prestige. Perhaps a possibility of varying the number from time to time should be safeguarded.

The Covenant of the League of Nations originally envisaged a Council of representatives of nine States, but it empowered the Council, with the approval of the majority of the Assembly, to increase the number of States to be represented. Only eight States were represented in the Council in the beginning, but in 1922 the number was increased to ten, in 1926 to fourteen, in 1933 to fifteen, and in 1934 to sixteen.

As the Executive Council here envisaged would be a relatively small body, each State represented should have one vote. In view of the nature and functions of the body, it is proposed that, as a general rule, its decisions should be taken by unanimity, but this rule should not apply to decisions with regard to appointments or matters of procedure, for which a majority vote should suffice. The requirement of unanimity would restrict the action which the Executive Council might take, but it seems to be necessitated by the probable insistence of States playing an important rôle in international affairs. It would have the advantage of assuring the wider support of decisions and thus of increasing the efficacy of action taken by the Executive Council.

PROPOSAL 4

(1) In the selection of States for representation in the Executive Council, special consideration should be given to the importance of their rôle in international affairs. Initially, the States entitled to representation in the Executive Council should be named. Certain States might be named as entitled to representation until the selection of their successors; other States might be named as entitled to representation for a fixed period, or for fixed periods, of years. The selection of their successors, and possibly of other States to be entitled to representation, should be entrusted to the General Assembly.

(2) Any State not represented in the Executive Council should be entitled to participate, without a vote, in the consideration by the Executive Council of any matter specially affecting its interests.

COMMENT

The Executive Council is proposed as a body to have a great authority, to be invested with large powers, and to be capable of taking effective action. Such a body would require the representation of those States which may be at the time in a position to assume and to discharge responsibility for the decisions taken.

The Proposal calls for giving special consideration to the importance of the rôle of States in international affairs. This standard cannot be applied as a rule of thumb. No fixed criteria are available, and perhaps none can be devised, for a precise measuring of the relative importance of the rôles played by States. Despite its generality, the standard is susceptible of application. Indeed, it is generally applied in popular thought which distinguishes between "Great States" and others. It would not be invidious to make such a distinction, for States are only too aware of the differences in the responsibilities which they are able and willing to assume.

An analogy is to be found in the Constitution of the Interna tional Labor Organization, in the provision that each of the eight Members "of chief industrial importance" is entitled to appoint a representative in the Governing Body. This formula has been applied without producing any considerable dissatisfaction. In 1926, the Austrian Government drew upon the analogy for a proposal that the Council of the League of Nations should be composed of representatives of the States which, considering "international political power, extent of territory, and degree of influence abroad," could be said to be of "chief universal importance."

The standard proposed would exclude certain States from eligibility for representation in the Executive Council. It would not exclude consideration of geographical position, however, for that is a necessary element of importance in international affairs. Yet escape must be found from any practice of automatic rotation, the danger of which was demonstrated by the experience in the League of Nations.

A fixed geographical allocation of seats in the Council of the League of Nations was decided upon in 1920, and it was not displaced by a later determination that regard should be paid to "the main geographical divisions of the world, the great ethnical groups, the different religious traditions, the various types of civilization, and the chief sources of wealth." In practice, a group system was followed in the allocation of "seats" on the Council, three seats being allocated to Latin-American States, two to Asiatic States, one to "Nordic" States, one to Little Entente States, one to British Dominions, and one or two to other States, with Poland and Spain occupying a special position as to re-eligibility. A system of rotation adopted by States in certain groups led, in the later years, to the selection for representation in the Council of States which were so incapable of assuming responsibilities as to rob the Council of much of its power and prestige.

In the beginning, the selection of the States to be represented in the Executive Council should be made by those who initiate the organization. Some of the States thus selected might be entitled to representation until the selection of their successors, others for a fixed period, or fixed periods, of years. It should be left to the General Assembly to select the successors to such States. No successors might be selected for some of the States originally named, or under a system to be adopted some States might be selected to succeed themselves. The General Assembly might also be given power to select additional States. Terms could be later fixed during which the representation would continue, and the same terms would not be necessary in all cases.

The Proposal would make a significant departure from the Covenant of the League of Nations. Though it named the States to be represented in the Council in the beginning, the Covenant provided that certain States, described as "the Principal Allied and Associated Powers" (an amendment proposed in 1938 would have eliminated this description), were to have permanent representation in the League Council; and with the approval of the Assembly, the Council was empowered to name additional States for permanent representation. Only the selection of States for non-permanent representation was entrusted to the Assembly. The distinction between permanent and non-permanent representation was resented by some States as invidious, and upon the admission of Germany in 1926, the difficulties encountered in increasing the number of States entitled to permanent representation led to the withdrawal of Brazil. Moreover, embarrassment ensued from the conduct of some of the States entitled to permanent representation —in two instances, such States were found to have violated their covenants.

More satisfactory results may be anticipated if the power of selection entrusted to the Assembly be enlarged, and if the invidious distinction between permanent and non-permanent representation be abolished. This course would better provide for the changes which will inevitably occur. It should not be inacceptable to the States which are accustomed to discharging the larger responsibilities in world affairs. So long as they continue to play such rôles, the necessity of their being represented in the Council will be generally appreciated. Such States would also have great influence in the General Assembly, and representatives in the latter body, genuinely interested in maintaining the Executive Council, would hardly fail to agree that these States should be entitled to continued representation. Sabotage is not to be anticipated, though it might remain possible within any formal scheme to be devised.

In this connection, the experience in the elections of judges of the Permanent Court of International Justice is illuminating. The pretension of the so-called "Great States" to representation was quite as effective in delaying the establishment of a permanent court as was the insistence of other States upon recognition of equality. It was one of the reasons, also, for entrusting

the election of judges of the Court established in 1920 to both the Assembly and the Council of the League of Nations; when that step was taken, it was anticipated that five of the nine seats in the Council would be held by the "Great States," yet even after the composition of the Council had been changed, after control of the elections had passed out of the hands of States permanently represented, nationals of the "Great States" continued to be elected as judges of the Court, almost as a matter of course.

It may be noted that the rules adopted by the Assembly of the League of Nations in 1926 provided that at any time the Assembly might "by a two-thirds majority, decide to proceed . . . to a new election of all the non-permanent Members of the Council." In application of this rule it was possible for the mandate of a State to be revoked during the term for which it had been elected for representation.

The national experience of certain federal States is also suggestive in this connection. No one of the twenty-two cantons of the Swiss Confederation is entitled to representation in the Swiss Federal Council, yet since 1848 two of the seven members of that body have regularly been selected from the two largest cantons, Bern and Zurich. No state of the United States of America is entitled to representation either in the Supreme Court or in the President's Cabinet, yet for more than a hundred years the membership of both of these bodies has with rare and brief exceptions included citizens of the State of New York.

The Proposal also provides that even though it is not one of the States represented in the Executive Council, a State should be entitled to participate in the consideration of any matter specially affecting its interests. In line with other Proposals, it is suggested that in such a case the State should not have a vote. On this point, also, the Proposal would depart from the precedent in the Covenant of the League of Nations, under which such a State ordinarily had the privilege of voting.

PROPOSAL 5

(1) Except as may be expressly provided otherwise, the General Assembly and the Executive Council should have power to establish their own rules of procedure.

(2) Subject to such exceptions as may be provided in the rules of procedure, meetings of the General Assembly and the Executive Council should be held in public and the minutes of all meetings should be published promptly.

COMMENT

It is obviously impossible to determine in advance all of the rules of procedure to be followed by such bodies as the proposed General Assembly and Executive Council. Except on points covered by specific provisions, each of

these bodies should be empowered to draw up its own rules of procedure, and to modify such rules in the light of experience.

A large body such as the General Assembly would of necessity meet in public. The Proposal would establish this general rule for the Executive Council, also, for it seems important that States not represented in that body should be currently apprised of its activities. Yet in some cases, which would be covered by special exceptions in the rules of procedure, the way should be left open for variations from the general rule. The prompt publication of minutes of both bodies would extend the knowledge of their functioning to a general public.

Experience in the League of Nations serves to emphasize the importance of the second part of this Proposal. Meetings of the Assembly of the League of Nations were invariably held in public, and minutes were promptly published; in its rules, however, the Assembly reserved power to "decide that particular meetings shall be private." Some of the earlier meetings of the Council of the League of Nations were not held in public, and the minutes were not published at the time; but after some agitation this rule was soon reversed, and the minutes of the earlier meetings were opened to public circulation. The rules of the Council continued to reserve the possibility of both private and secret meetings, and they required some decisions, particularly decisions concerning persons, to be taken at private meetings.

The minutes of the International Labor Conferences were regularly and promptly published from the beginning, but the minutes of the Governing Body of the International Labor Office were not made available to the public until 1932.

The practice of the Union of American Republics leaves much to be desired in this connection. The preparation and publication of records of the International Conferences of American States have been entrusted to the Governments which were hosts to the Conferences, and the results have been far from satisfactory. In 1933, the Seventh Conference called for publication of the minutes within a year from the day of adjournment, in a uniform type and according to a systematic plan.. The Governing Board of the Pan American Union publishes no records of its proceedings.

PROPOSAL 6

The General Assembly should have power to deal with all questions relating to the general budget, to decide upon methods of providing funds for meeting expenses, and to fix the proportions in which States should contribute to such funds.

COMMENT

Any effective international organization must be assured of an adequate budget. Activities can be undertaken only if funds are available for meeting expenses. Various methods might be adopted for raising such funds.

In any case, it would probably be necessary to rely upon contributions from all the participating States. Hence, a general responsibility for questions relating to the budget should be entrusted to the most representative body in an organization. The Proposal would invest the General Assembly with general powers in connection with the budget and its alimentation.

Experience in the League of Nations would seem to support the Proposal. The original Covenant provided that the expenses should be borne by the Members of the League "in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union"; in that apportionment, States were ranked in several classes, and the classes paid varying numbers of units. Though this system had worked satisfactorily for the small expenses of the International Bureau of the Universal Postal Union (then about 125,000 Swiss francs, or $25,000), it soon became apparent that it would not serve for the larger expenses of the League. In 1924, the Covenant was amended—the amendment had been proposed in 1921—to provide that the expenses should be borne by the Members "in the proportion decided by the Assembly." Gradually, control over finances shifted to the Assembly, to the exclusion of the Council. The Assembly's Allocation Committee found it impossible to arrive at any "purely scientific scale of allocation"; adopting "capacity to pay" as a guide, it took into account data relating to "population, production, trade and banks, transport, and budgets" of the various States. By the scale of 1937, which provided for the 1938 budget of the Secretariat, the International Labor Organization and the Permanent Court of International Justice, amounting to 32,273,251 Swiss francs (roughly $8,000,000), 932 units were allocated, 108 units (11.5 per cent) being allocated to the largest contributor (the United Kingdom of Great Britain and Northern Ireland).

For the budget of the Pan American Union (in 1943, $419,647), a quota is fixed for each State at the rate of $1.50 per 1000 of population. Under this system, the largest contributor (the United States of America) is called upon to pay 54 per cent of the expenses, and the second largest contributor (Brazil) 16 per cent; so that 70 per cent of the budget is contributed by two of twenty-one States. Though the scheme has the advantage of a scale definitely fixed in advance, it would hardly serve for a much larger budget. In some smaller international organizations, States pay equal contributions; in others, quotas are based on such factors as commerce, tonnage, exports and imports, or production, or on some combination of them.

Perhaps no satisfactory method of alimenting a relatively large budget can be fixed in advance. The Proposal would leave the financial problem to a body which could be guided by its own experience. If votes in the General Assembly were weighted in accordance with contributions, however, the problem would cease to be merely financial, and would take on a political aspect of first importance.

PROPOSAL 7

The General Assembly should have power, by two-thirds vote and with the concurrence of the Executive Council, to modify general rules of international law and to enact new general rules of international law.

COMMENT

In the past, a change in the general rules of international law has been possible only with the consent of States. No method was prescribed for the giving of consent, nor was any particular procedure required for ascertaining that it had been given. Some formulations of new law came to be admitted to have a general validity even by States which had not given their formal consent. Indeed it may be said that it was never thought to be necessary to get the consent of all of the existing States for the extension of international law.

During the past hundred years, legislation with respect to problems of international law, effective for the participating States only, has become very common. In isolated instances, it has resulted from proposals made by a single State and approved by other States—for example, a proposal made by Great Britain in 1862 was approved by other maritime States and became the first International Rules of the Road at Sea. Legislation has usually resulted from the deliberations of international conferences, however, and it has taken the form of instruments opened to signature and ratification, or to accession; exceptionally, the formality of signature has been omitted as to some instruments, for example, the international labor conventions and the 1928 Geneva Act on Pacific Settlement of Disputes. The signatories of instruments were usually free to give or withhold their ratifications, and constitutional procedures in many States calling for the participation of legislative bodies have tended to preserve the necessity of ratification following signature or accession. Rarely have conferences promulgated measures to be immediately binding and effective.

It has proved difficult to achieve general uniformity by this system. In many cases States have failed to deposit ratifications of or accessions to conventions to which they had no grave objections, and long delays have frequently resulted. Thus, to cite a few examples, the United States of America acceded to the 1864 Geneva Red Cross Convention in 1882; Turkey acceded to the 1881 Convention on Phylloxera in 1935; Chile acceded to the 1906 Convention on Use of White Phosphorus in the Manufacture of Matches in 1936; and Paraguay ratified the 1912 Opium Convention in 1943.

In some cases, the entry into force of conventions, even for States which have ratified them, has been long delayed by the failure of other States to ratify. Even in ordinary cases, where no great controversy raged and no strong objection was voiced, the process of securing the ratification of an

international instrument by a considerable number of States has frequently occasioned a delay of several years. Thus the 1929 Protocol amending the Statute of the Permanent Court of International Justice did not enter into force until 1936; and the last of the ten ratifications required to bring the 1930 Protocol on Military Service of Persons having Double Nationality into force was not deposited until 1937.

Clearly, a more efficient and a more expeditious method should be available for effecting needed changes in the general rules of international law. The method which has prevailed in the past can be continued, and in some cases it may suffice for the desirable legislation. Yet it should be supplemented by a less cumbrous method which could be employed if desired by a large preponderance of the States.

The Proposal would vest a power of international legislation in the General Assembly, limited to the amendment and enactment of general rules of international law. It would in no way encroach upon the legislative powers exercised by any national congress or parliament. National legislatures have never been competent to effect changes in international law. Determination of the manner in which a State is to perform its international obligations and of the manner in which the rules of international law are to be incorporated into the national law of a State, however, would still remain within the competence of that State's own legislature.

Any exercise of the power to modify existing general rules and to enact new general rules of international law would require both a two-thirds vote in the General Assembly and a unanimous vote in the Executive Council. It would of course be preceded by the necessary investigations and deliberations, which would entail the collaboration of experts. Hasty action is not to be feared in such a process, nor would Governments be confronted with any necessity of decisions as to which they would not have had plenty of advance notice.

The Proposal is not altogether an innovation. Though the Universal Postal Conventions are formally subject to ratification, they are habitually brought into force on definite dates, even for States which have not then and do not later ratify. These Conventions have long provided that proposals made in the interval between conferences with the support of three postal administrations shall be voted upon by all the administrations in the Union; in some cases a unanimous vote, in other cases a two-thirds vote, is required for the adoption of such proposals, and if only the interpretation of an existing text is involved a majority vote is enough. The 1919 Convention on Air Navigation empowered the International Commission on Air Navigation to amend certain annexes to the Convention by "three-fourths of the total possible votes which could be cast if all the States were represented." The Covenant of the League of Nations provided that amendments of its text would take effect when ratified by the Members represented in the Council

and by a majority of the Members represented in the Assembly; but any Member was permitted to signify its dissent, and thereby to effect its withdrawal from the League.

The practice of the Assembly of the League of Nations may also be mentioned in this connection. In no case did the Assembly assume to promulgate legislative acts binding on States, though this might have been within its powers exercisable by unanimous vote. Only exceptionally did it open to signature and ratification or to accession instruments of its own formulation; *e.g.*, the 1920 Protocol of Signature and Statute of the Permanent Court of International Justice, and the 1928 General Act on the Pacific Settlement of Disputes. The Assembly's "decisions" usually took the form of recommendations addressed to Governments, or of resolutions in the nature of recommendations. When it desired that more immediate effect be given to its "decisions," it habitually referred them to the Council with suggestions as to the action to be taken; but in some cases diplomatic conferences were convoked for the purpose.

The Proposal would open the way for conscious effort to modernize some of the principles of international law, and to keep its content up to date.

PROPOSAL 8

(1) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of any alleged failure by a State to carry out its obligations under international law, and if the failure is established to take such action as it may deem to be necessary for the protection of the interests of the Community of States.

(2) If the State which is alleged to have failed to carry out its obligations is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

COMMENT

If the organization of the Community of States is to have firm legal foundations, if a legal order is to be maintained in the relations of States, it seems essential that a responsible body should be competent to deal with violations of international law. States would be reluctant to abandon the use of force for self-help, they would be unwilling to observe legal limitations in their own conduct, if they felt that other States could repudiate their obligations with impunity. Nor would the general interest in the supremacy of law be protected if no means were available for its vindication.

The Proposal would empower the Executive Council, acting upon its own initiative or at the request of any State, to take cognizance of any alleged failure by a State to carry out its legal obligations. It would leave the Executive Council free to appreciate any situation which might arise. Some cases might be so trifling that the Executive Council would decide not to interpose; other cases might be of such gravity as to require action for the

protection of the interests of the Community of States, and the powers of the Executive Council should be sufficient to enable it to take such action. In a proper case, such action might extend to assuring the indemnification of a State which has been injured by the failure.

In any case, it would be necessary to establish very clearly both the obligation of the State and its failure to perform that obligation. At times, the obligation might be indisputable and the fact of failure might be notoriously patent; for example, a judicial pronouncement might already have been made. Otherwise, the Executive Council would be under the necessity of conducting the investigation required. In a proper case, it might request an advisory opinion of the Permanent Court of International Justice on a doubtful question of law or fact, or it might institute a special procedure. The Council of the League of Nations frequently set up special commissions to conduct investigations, as well as commissions of jurists to advise on legal questions before it.

The Proposal is in line with historic precedents. Repeatedly in the past, the failure of a State to live up to its legal commitments has led to a conference of "the Powers." Many examples might be cited; among others, the London Conference of 1871, and the action taken by various States in the Far East in 1890 and 1901. A more recent precedent is the Stresa Conference of 1935 on the occasion of Germany's announcement of a policy of rearmament, and the ensuing resolution adopted by the Council of the League of Nations declaring that "Germany has failed in the duty which lies upon all the members of the international community to respect the undertakings which they have contracted," and condemning the "unilateral repudiation of international obligations."

It may also be noted that the Minorities Treaties of 1919 and 1920 provided that any member of the Council should "have the right to bring to the attention of the Council any infraction, or any danger of infraction, of any of these obligations, and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances." Numerous cases arose under these provisions, and a special procedure was adopted for dealing with them.

In 1942, the Ministers of Foreign Affairs of the American Republics declared that if any agreement between American Republics should be violated, or if there should be "reason to believe that a violation which might disturb the peace or solidarity of the Americas is being contemplated," a procedure of consultation might be initiated "with the object of agreeing upon the measures to be taken."

This is clearly one of the cases in which the State whose conduct is under consideration should not be able to negate action by its own vote if it is represented in the Executive Council. This could be prevented by a provision that it is not then to be entitled to a vote. In this respect, the Proposal is in line with a provision in the 1921 Aaland Islands Convention which em-

powered the Council of the League of Nations "to decide upon the measures to be taken either to assure the observance of the provisions of this Convention or to put a stop to any violation thereof," and stipulated that "the vote of the representative of the Power accused of having violated the provisions of this Convention shall not be necessary to constitute the unanimity required for the Council's decision."

PROPOSAL 9

(1) The Executive Council should have power, with the concurrence of the General Assembly, to adopt general provisions for preventing or suppressing the use of force by States in their relations with other States.

(2) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of any use of force or threat to use force by a State in its relations with any other State, to take such action as it may deem to be necessary for the protection of the interests of the Community of States, and to prescribe the specific measures to be taken by States for preventing or suppressing the use of force.

(3) If the State which has used force or threatened to use force is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

COMMENT

If the peoples of the world desire to proscribe the use of force in international relations, if they wish to pursue the recent tentatives in that direction, it must be realized that a mere pronouncement is not enough. The weakness of the Covenant of the League of Nations was that it did not go far enough in proscribing the use of force; the vice of the Paris Treaty for the Renunciation of War of 1928, as of the Rio de Janeiro Anti-War Treaty of 1933, was that it stopped short with a mere dictum. If substantial progress is desired, the proscription must be implemented by giving powers to a life-and-blood institution, so organized that it can pursue continuing and unremitting effort and that it can employ the sagacity available at the time in dealing with situations as they arise. No cut-and-dried solution will suffice. No schematic plan will be proof against vicissitude. What can be done with some hope of success is to announce a clear goal, to create an institution capable of mobilizing both will and wisdom for attaining it, and to leave the precise procedure to be worked out in the light of unfolding events.

The Proposal would implement the Postulate that any use of force or any threat to use force by a State in its relations with another State is a matter of concern to the Community of States. First of all, it would confer on the Executive Council and the General Assembly power to take general dispositions to prevent or suppress the use of force by States in their relations with other States. No attempt is here made to indicate the nature of such dispositions. They would derive their character from current thought, and

they would doubtless be changed from time to time. No generation can devise a straitjacket for future generations.

In exercise of this general power, the Executive Council and the General Assembly might lay down procedures to be followed. Such action was taken by the Assembly and Council of the League of Nations in 1927, in a resolution which codified the practice under the Covenant and which was intended to serve as a guide in times of emergency. Both the 1930 Geneva Convention on Financial Assistance and the 1931 Geneva Convention to Improve the Means of Preventing War contain suggestive indications as to procedures which might be adopted.

In exercise of this general power, also, the Executive Council might find it practicable to organize naval, military, or air forces, which could be used to prevent or suppress aggression. Suggestions of a need for an international force have been voiced recurrently in recent years. Detailed plans for creating an "international police force" were placed before the Disarmament Conference in 1932 by one Government, and were approved by nine other Governments. The Executive Council might find it desirable to depend, at least in part, upon the use of national forces in any case of need, and its dispositions might determine in advance when such forces would be called upon and how they would be used.

Secondly, the Proposal would confer on the Executive Council power to take cognizance of any use of force or of any threat to use force by a State in its relations with any other State. Each State would have a duty, under a Principle previously formulated, to refrain from any use of force and from any threat to use force in its relations with another State, except as authorized by the competent agency of the Community of States; but, as the corresponding Principle stated, a State should be able, subject to reference to and approval by the competent agency of the Community of States, to oppose by force an unauthorized use of force or threat to use force made against it by another State. The Executive Council should be the competent agency of the Community of States for this purpose. It should be left free to appreciate any situation which might arise, and to shape its action to meet the needs of that situation. It must have a plenary power to take the action which is necessary for the protection of the interests of the Community of States.

To this end, the power of the Executive Council should extend to prescribing the specific measures to be taken by States for preventing or suppressing the use of force. No attempt is here made to indicate the nature of such measures. It would depend upon the Executive Council's appreciation of the situation and of the possible ways of meeting it. The situations which would arise might present very different kinds of problems, and the measures to be taken by one State in any situation might be very different from those to be taken by other States in that situation, and different from those to be taken by that State in other situations. Of course the resources

and geographical position of each State would be taken into consideration. The Executive Council might prescribe measures of a military character, or measures of an economic nature, or both. Its action should be possible without the vote of the State whose use of force is in question, if that State is represented in the Executive Council.

Important precedents for the Proposal are to be found in recent history. The Covenant of the League of Nations provided that "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations"; the Members undertook to subject a Member which had resorted to war in disregard of certain covenants, "to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State"; the Council was to "recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League"; and the Members agreed to "mutually support one another in the financial and economic measures which are taken," and "to afford passage through their territory to the forces of any Members of the League which are coöperating to protect the covenants of the League." An amendment to the Covenant, proposed in 1921 but not brought into force, would have empowered the League Council "to give an opinion whether or not a breach of the Covenant has taken place," and "in deliberations on this question in the Council the votes of Members of the League alleged to have resorted to war and of Members against whom such action was directed" would not have been counted.

These obligations were reënforced by provisions in certain particular treaties. Under the Aaland Islands Convention of 1921, ratified by ten European States, any party might apply to the League Council "to decide upon the measures to be taken to assure the observance of the provisions of this Convention or to put a stop to any violation thereof"; the parties undertook "to assist in the measures which the Council might decide upon," and if unanimity could not be obtained, each party was "entitled to take any measures which the Council by a two-thirds majority recommends"; in either case the vote of the State "accused of having violated the provisions" was not to be counted.

The abortive Geneva Protocol on the Pacific Settlement of International Disputes of 1924 would have empowered the Council of the League of Nations in certain cases of actual or threatened aggression to "decide upon the measures to be taken with a view to end as soon as possible a situation of a nature to threaten the peace of the world," and to take such decisions by two-thirds vote; and under certain conditions States would have been obligated to apply the sanctions of the Covenant and "to coöperate loyally and ef-

fectively in support of the Covenant of the League of Nations, and in resistance to any act of aggression, in the degree which its geographical position and its particular situation as regards armaments allow." The 1924 Protocol also envisaged that States might give to the Council advance undertakings as to "the military, naval and air forces which they would be able to bring into action immediately to ensure the fulfilment of the obligations in regard to sanctions."

In the 1925 Locarno Treaty of Mutual Guarantee, Belgium, France, Germany, Great Britain, and Italy, agreed that in case the Council of the League of Nations should find that a flagrant violation of certain obligations of Belgium, France or Germany not to resort to war had been committed, they would "act in accordance with the recommendations of the Council, provided that they are concurred in by all the members other than" the States engaged in hostilities.

The precedents are few for the actual employment of the armed forces of various States under general international authority. The joint employment of the forces of eight States in China in 1900, at the time of the Boxer difficulties, was undertaken without any mandate from other States. Mention may be made, however, of the action of the Council of the League of Nations in 1934, extending to the British, Italian, Netherlands, and Swedish Governments an invitation "to take part in the establishment of an international force to be charged . . . with the maintenance of order . . . before, during and after the plebiscite" in the Saar Territory. This invitation was accepted by the four Governments, each of which provided a contingent of the international force of 3,300 men placed at the Council "at the disposal of the international Governing Commission of the Saar Territory," other States giving facilities for the transit of these contingents through their territories; and during a period of two months the force discharged its mission without serious incident.

PROPOSAL 10

(1) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of the prevalence within the territory of any State of conditions which menace international peace and order, and to take such action as it may deem to be necessary for the protection of the interests of the Community of States.

(2) If the State within whose territory the conditions prevail is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

COMMENT

Instances have not been rare in the past in which States have permitted conditions to prevail within their territories which menaced international peace and order, and in which other States acted to remedy the situation.

At times, such action was taken by a number of States in concert, but not infrequently it was taken by one State acting upon its own authority.

The international law of the future should make it a legal duty of each State to see that the conditions prevailing within its territory do not menace international peace and order. At the same time, it should enunciate a duty of each State to refrain from intervention in the internal affairs of any other State. Nor should it be left possible for a few States, acting on their own authority and according to no established procedure, to organize such an intervention. If these steps are taken, a power should be conferred on the Executive Council, acting as an organ of the Community of States and subject to the limitations of its procedure, to seek the removal of conditions in the territory of any State which menace international peace and order.

The Proposal is in line with a provision in the Covenant of the League of Nations declaring it to be "the friendly right of each member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." Under this provision, the Council adopted a resolution in 1934 declaring that "it is incumbent on the Hungarian Government, conscious of its international responsibilities, to take at once appropriate punitive action in the case of any of its authorities whose culpability may be established" in connection with the preparation of the crime of Marseilles.

PROPOSAL 11

(1) The Executive Council should have power, with the concurrence of the General Assembly, to create and maintain such special agencies as may be needed for dealing with matters of concern to the Community of States.

(2) Special agencies should be envisaged with respect to such matters as:

- **(a) The size and type of armaments, and the manufacture of arms and ammunition.**
- **(b) International trade.**
- **(c) Production and distribution of food and raw materials.**
- **(d) International finance and investments.**
- **(e) International transport, and particularly aerial transport.**
- **(f) International communications.**
- **(g) Welfare of dependent peoples.**
- **(h) Public health.**
- **(i) International traffic in narcotics and dangerous drugs.**
- **(j) Population problems, including international migration.**
- **(k) Cultural and scientific interchange.**

COMMENT

A general organization of the Community of States should give continuous attention to the protection and advancement of peoples' common interests.

Some of the problems which will arise may be "political," in the sense in which that term is commonly used; others which are primarily economic or social or cultural may at any time be invested with political significance.

For the most part, ultimate responsibility must rest with the General Assembly and the Executive Council, which should have general competence, but these bodies must have the assistance of special agencies working in particular fields Many questions will need to be explored by personnel having the capacity of specialists. Such explorations would involve an expenditure of an amount of time which first-rank political men could not spare, and they should be made by men who can capitalize on accumulated experience.

It is not possible to enumerate all of the fields in which special agencies may be needed, and the determination of them must be left to unfolding experience. The list contained in the Proposal emphasizes the importance of agencies in certain fields, but it does not exclude others. As to most of the fields listed, there is a rich history of coöperative international effort; as to some of them, agencies already exist which could be continued. Numerous multipartite international conventions are in force, and if the precedent of 1919 is followed some of them will be recognized to continue in force after the present war.

(a) If the Principle is to be implemented that each State has a legal duty to conform to limitations prescribed with respect to the size and type of its armaments, a special agency is clearly needed in this field. The problems will require continuous attention, and solutions will be found for them only if determined efforts are made over the years. The failure of the provisions in the Covenant of the League of Nations to produce the desired result has revealed some of the difficulties which may be encountered, and it has shown that no simple method of approach to them will suffice.

The Covenant laid down a general principle that armaments should be reduced "to the lowest point consistent with national safety and the enforcement by common action of international obligations"; it provided that "the Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments"; and it envisaged a permanent Commission "to advise the Council." The Council created a permanent commission in 1920, but it was gradually superseded by a Temporary Mixed Commission, created in 1921, a Coördination Commission, created in 1924, and a Preparatory Commission, created in 1925. No permanent results were achieved by the Disarmament Conference which convened in 1932, nor was great progress made by other conferences on armaments, held in later years.

The manufacture of arms and ammunition presents problems germane to those relating to armaments. In the Covenant of the League of Nations,

States agreed "that the manufacture by private enterprise of munitions and implements of war is open to grave objections," and the Council was to "advise how the evil effects attendant upon such manufacture can be prevented." Little progress was made in dealing with this subject. A Convention on International Trade in Arms and Ammunition, opened to signature on June 17, 1925, was ratified by seventeen States; but as the conditions set in some of the ratifications were never met, the Convention did not enter into force.

(b) Problems related to international trade cover a wide range. During the decade before 1939, it became clear that national recovery programs, if not correlated, operated to extend the area and to intensify the effects of economic depressions. Through the Economic and Financial Organization of the League of Nations, significant progress has been made in recent years with reference to problems of economic and financial policy, including problems relating to currency, economic depressions, financial reconstruction, nutrition, population movements, raw materials and taxation. The Organization continues to maintain an Economic Committee, a Financial Committee, a Fiscal Committee and a Delegation on Economic Depressions, all of which have met and issued reports in 1942–1943. Its efforts have inspired extensive legislation; to prevent double taxation, for example, more than one hundred bipartite agreements have been concluded on the basis of its models.

Directives of more recent formulation are also at hand, emphasizing the interdependence of peoples in the economic field. The Atlantic Charter calls for "the fullest collaboration between all nations in the economic field," and it sets as a goal of effort "the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms to the trade and to the raw materials of the world which are needed for their economic prosperity." This was supplemented in the various mutual aid agreements of 1942 and 1943, by provision for "the betterment of world-wide economic relations" by action "directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples."

(c) The production and distribution of food and raw materials has led to many problems which have been dealt with in recent years by international conventions. Efforts have been made to coördinate the production and export of coffee, rubber, silver, sugar, tin, and other commodities. The International Institute of Agriculture, established at Rome in 1905, has served as a central statistical organization and as a forum for the discussions of agricultural questions; its efforts have led to international conventions on various subjects, such as the marking of eggs in international commerce (1931), analysis of cheeses (1934), methods of analysis of wines (1935), methods of

keeping herdbooks (1936). The Wheat Agreements of 1933 and 1942 projected far-reaching international controls. The United Nations Conference on Food and Agriculture, held at Hot Springs in 1943, recommended the establishment of "a permanent organization in the field of food and agriculture."

(d) In the field of international finance, various monetary unions have existed in the past, the most important being the Latin Monetary Union created in 1865. A Bank for International Settlements has existed since 1930, and the creation of an Inter-American Bank is envisaged in a pending convention.

(e) The revolutionary development of transport in modern times has led to the creation of numerous international agencies. Railway transport on the continent of Europe has been coördinated by the Union for Transport by Rail, functioning since 1893. International conferences on questions relating to maritime transport have been frequent since the Washington Conference of 1889. The international circulation of automobiles has been regulated since 1909. The Communications and Transit Organization of the League of Nations, created in 1920 and now existing under a Statute revised in 1938, has served to coördinate efforts in this field; in addition to its handling of numerous disputes, its activities have led to conclusion of some twenty international conventions, dealing with such subjects as freedom of transit, navigable waterways, regime of railways, regime of maritime ports, maritime signals, uniform buoys, unification of road signals, and taxation of motor vehicles.

Under the Paris Convention on Air Navigation of 1919, to which thirty-three States became parties, a permanent International Commission for Air Navigation has been maintained since 1922. Some of the provisions of the Paris Convention were duplicated in the Inter-American Commercial Aviation Convention of 1928, to which eleven States are parties. Conventions on private aerial law were drawn up at Warsaw in 1929 and at Rome in 1933 and a Sanitary Convention for Aerial Navigation was opened to signature at the Hague in 1933. Aerial transport has also been regulated by more than a hundred bipartite treaties. With the rapid developments of recent years, and particularly during the present war, the time has arrived for a revision and coördination of these various instruments, and the prospect of future developments may necessitate an elaboration of the permanent machinery now existing. A guide for the future has been set by the Canadian Government in a recent declaration of its willingness to shape its policy of "international collaboration and coöperation" with regard to air transport "to serve not only the immediate national interests of Canada but also our overriding interests in the establishment of an international order which will prevent the outbreak of another world war."

(f) Since the middle of the nineteenth century efforts have been proceeding to deal with the problems presented by the development of international communications. The International Telegraphic Union was organized in 1865, and the Universal Postal Union in 1874. A Convention on Submarine Cables of 1884 enlisted the support of some thirty-five States. Since 1906, radio-communication has been the subject of frequent conferences; multipartite conventions were concluded in 1912 and 1927, and a large volume of general and regional legislation now exists on the subject. The International Telecommunication Union, organized in 1932, is the subject of a separate Proposal.

(g) The problems of peoples now in a state of dependence are among the most baffling in the whole field of international relations. Whatever changes may result from the war, these problems will continue to face the next generation, and perhaps they will be more aggravated than heretofore.

The subjection of the continent of Africa led to international conferences at Berlin in 1885, at Brussels in 1890, at Algeciras and Brussels in 1906, and at St. Germain in 1919, and many African problems were dealt with constructively in the numerous treaties which resulted. The League of Nations system of mandates applied only to certain disannexed territories, for which the Covenant laid down the principle that "the well-being and development" of their peoples "form a sacred trust of civilization." The work of the Permanent Mandates Commission, in its thirty-seven sessions, has established many useful precedents. Further directives are contained in the Inter-American Convention on the Provisional Administration of European Colonies and Possessions in the Americas, concluded at Habana in 1940, to which seventeen American States are parties. That Convention vests responsibilities in "the American Republics as an international community."

These historical developments furnish a basis for the recognition of an interest of the Community of States in the welfare of dependent peoples, and States entrusted with the administration of the affairs of such peoples have a clear responsibility to the Community of States. It is not merely a question of assuring equality of opportunity in dependent areas for outside States; it is a question also of protecting dependent peoples against serfdom and exploitation, and of assuring to them an opportunity of developing their indigenous cultures and their self-respect. The post-war political situation will determine the extent of the Community interposition and how the Community's interest will be asserted.

(h) In the field of public health, common action has been taken by States since the middle of the nineteenth century. The need for control of epidemics led to international conferences as early as 1851 and 1859, and conferences have been frequent in the subsequent years. Important Sanitary Conventions were concluded at Habana in 1924, and at Paris in 1926, and a

Convention on Contagious Diseases of Animals was concluded at Geneva in 1935.

Permanent agencies have long existed in this field. The Pan American Sanitary Bureau was created in 1902, and the International Office of Public Health was established at Paris in 1907. Conventions on the unification of pharmacopoeial formulas were promulgated in 1906 and 1929.

The activities of the Health Organization of the League of Nations, which have been continued during the present war, have extended international effort into many new fields, including the organization of epidemiological intelligence, the standardization of sera and vitamins, the nomenclature of diseases and causes of death, and the coördination of the training of public health personnel. The Health Organization has organized numerous conferences, both general and regional. It has directly assisted many countries in the establishment of public health services and in combating endemic and epidemic diseases. By organizing world-wide research on cancer, cholera, diphtheria, leprosy, malaria, rabies, sleeping sickness, syphilis, and tuberculosis, it has made a notable contribution to the advancement of public health in all countries.

(i) In no field has international coöperation been pushed further than in the field of control of opium and other narcotic drugs. The International Opium Convention of 1912 came into general application in 1920, as a result of a provision in the Treaty of Versailles that ratification of the latter was to be deemed to be ratification of the former instrument. Under the auspices of the League of Nations additional drug conventions were concluded at Geneva in 1925, 1931, and 1936, and agreements concerning the suppression of opium-smoking in the Far East were signed at Geneva in 1925 and at Bangkok in 1931. Sixty-seven States are parties to one or more of these drug conventions. Preparatory work was under way in 1939 for an additional convention to limit the production of opium.

An elaborate international administration has been built up, consisting of (1) the Advisory Committee of the League of Nations, (2) the Permanent Central Opium Board created under the 1925 Convention, and (3) the Supervisory Body established under the 1931 Convention. The Conventions also entrust certain duties to the Health Committee and the Secretary-General of the League of Nations, and to the International Office of Public Health.

This administration deals with a variety of problems affecting agriculture, commerce, health, industry, and police. A system of estimates of national requirements of specified drugs is administered by the Supervisory Body. Each Government has a duty to submit advance estimates for each year for examination by the Supervisory Body, and the latter establishes estimates for those countries which fail to submit them. The system is now applicable to 177 "countries or territories"; the estimates submitted for 1942 were in respect of 117 "countries or territories." States have agreed, in the 1931

Convention, to restrict the manufacture of drugs to these estimates, and a report on their statistics as to consumption, manufacture, and export and import, is made by the Permanent Central Opium Board.

(j) The population of the world doubled in the two centuries which preceded 1850, and it has again doubled since that year. The distribution of the world's population at any particular time can never be considered as final. At no time in modern history have peoples kept themselves within the confines of continents or countries. So long as a world economy calls for the building up of undeveloped areas, so long as unequal opportunities exist in different parts of the world, so long as men seek to give vent to their disposition to roam and to create new lives for themselves, some avenues must be open for the movement of peoples. The demographic problem does not promise to be less acute during the generation to come.

Most States have shown a firm determination to safeguard the integrity of their population and economy by determining for themselves the categories of persons to be admitted or excluded. No interest of the Community of States would be served by attempting to force States to receive unwanted immigrants. Yet the variant policies of emigration and immigration States are susceptible of some reconciliation, and effort to this end may be essential. A conference of emigration States was held at Rome in 1921, and a conference of immigration States was held at Paris in 1923. Both emigration and immigration States were represented at conferences held at Rome in 1924 and at Habana in 1928. A conference of experts on coöperation with regard to emigration for settlement, held at Geneva in 1938, recommended the establishment of a permanent international committee on that subject. An Inter-American Demographic Conference, held at Mexico City in 1943, also envisaged the creation of a permanent committee.

The importance of demographic problems in the post-war world may call for a special agency which, functioning continuously, can be in a position to signalize any opportunity offered for relief from difficulties caused by the congestion of populations in certain parts of the world.

(k) The importance of cultural and scientific interchange has long been recognized by unofficial international associations. In recent years it has led to official coöperation, also. An International Committee on Intellectual Cooperation, created by the League of Nations in 1922, has devoted much of its activity to the International Institute of Intellectual Coöperation centered at Paris. A Conference held in Paris in 1938, at which forty-nine States were represented, promulgated a formal Act concerning Intellectual Coöperation, designed to lay new foundations for the Institute and to assure that coöperation would be "independent of politics and based entirely on the principle of universality." Eight Pan American Scientific Congresses have

been held since 1908. An Inter-American Convention on Cultural Relations, promulgated in 1936, is in force between fifteen American States.

The Proposal envisages the creation of agencies in these various fields without any attempt to forecast their specific powers. So far as possible, continuity with the past should be maintained. Some of the special agencies may have a character of permanence. Their powers would vary, and might have to be modified from time to time. In general, they should function under the authority of the General Assembly and the Executive Council, and they would need more or less constant supervision and coördination by the latter body.

PROPOSAL 12

The Permanent Court of International Justice should be maintained as the chief judicial organ of the Community of States, and its Statute should be adapted to the organization of the Community of States.

COMMENT

Fortunately, the organization of the Community of States does not have to be undertaken wholly anew. Numerous institutions are already in existence which can be adapted in a program of general organization. It is most desirable that continuity be preserved with the past, and this is particularly important with reference to judicial institutions.

A generation of effort triumphed in the establishment of the Permanent Court of International Justice. Fifty-two States have given their formal support to the maintenance of the Court, and practically all of the States of the world—including all of the States in the Western hemisphere—have become parties to instruments which give it jurisdiction. More than 500 treaties have been concluded which relate to the Court, and many of them continue in force.

Over a period of eighteen years, the Court functioned with a greater success than had been anticipated for it. Sixty cases came before it. The Court's thirty-two judgments, twenty-seven advisory opinions, and more than 200 orders, led to the settlement of numerous disputes, some of them very vexing in character. Some criticism of a judicial institution is inevitable, but in general the legal profession throughout the world has hailed the jurisprudence of the Court with satisfaction. The approval of its work by Governments is indicated by the fact that forty-seven States made effective declarations accepting the Court's compulsory jurisdiction over legal disputes.

The Court's Statute should be adapted to bring it into conformity with the post-war organization. This course is clearly to be preferred to any attempt to draft a new Statute. Such an attempt might reopen many questions to which solutions have already been given, and it seems doubtful whether a more satisfactory instrument would result. The adaptation

might lead to some changes in the present provisions for electing the judges and for meeting the expenses, and possibly greater usefulness could be found for the chambers of the Court; the chamber for summary procedure might be organized to serve the function of regional courts.

PROPOSAL 13

The Permanent Court of Arbitration should be maintained as an agency of the Community of States, and all States should be permitted to accede to the Hague Convention on the Pacific Settlement of International Disputes of October 18, 1907.

COMMENT

The Permanent Court of Arbitration has been maintained since 1900, under the Hague Conventions on Pacific Settlement of Disputes of 1899 and 1907. It is not really a court, for the 150 members appointed by Governments constitute only a panel for the manning of special tribunals to deal with particular cases. It is permanent only in the sense that this panel is always available, and in the sense that a permanent bureau is maintained under a council of administration.

Since 1900 some twenty-one cases have been brought before tribunals created within this framework; all but four of the cases were referred prior to the war of 1914–1918. Since 1922 the existence of the Permanent Court of International Justice has tended to eclipse the Permanent Court of Arbitration, but members of the latter have performed a useful function in nominating candidates in the elections of the judges of the former.

States may always agree to refer their disputes to special tribunals, and occasions may arise in which they will prefer to submit disputes to special tribunals which they may create out of the Permanent Court of Arbitration, rather than to submit them to the Permanent Court of International Justice with its fixed roster of judges. That possibility should be kept open, and as the maintenance of the Permanent Court of Arbitration involves but slight expense it should be continued.

The 1907 Hague Convention provides that the conditions on which Powers not invited to the Second Peace Conference in 1907 may accede shall be established by the later agreement of the parties, but as no general agreement has been made, unanimous consent of the parties is required for any accession. If the Permanent Court of Arbitration is to be continued, the 1907 Convention should be opened to accession by any State.

PROPOSAL 14

The International Labor Organization should be maintained as an agency of the Community of States, and its Constitution should be adapted to the organization of the Community of States.

COMMENT

The International Labor Organization is another of the existing institutions which should continue to be maintained. Created in 1919, it grew out of a movement for international labor legislation which began in the nineteenth century. A characteristic feature of the Organization, which gives it a tripartite aspect, is the representation of employers and workers, as well as of Governments, both in the International Labor Conference and in the Governing Body of the International Labor Office.

Sixty-four States—including all of the States of the Western hemisphere—have become members of the International Labor Organization. The International Labor Conference has met in twenty-six sessions. It has adopted sixty-seven draft conventions, some of which have been ratified by a large number of States, and sixty-six formal recommendations; a variety of subjects has been dealt with, including employment and unemployment, wages, hours of work, rest-periods and holidays with pay, health and safety and welfare in industry, social insurance, migration and statistics. The latest Conference, held in New York and Washington in 1941, planned a widening of the sphere of action of the Organization and pledged its availability in the post-war world.

PROPOSAL 15

Various existing international unions should be maintained as agencies of the Community of States, including the Universal Postal Union, the International Telecommunication Union, and others of proved usefulness.

COMMENT

In the past hundred years many international agencies have been created to deal with matters of concern to the Community of States. Apart from those established under the aegis of the League of Nations or the Union of American States, some twenty-five or thirty in each case, more than a hundred official agencies have come into existence. Many of them still function, and quite clearly some of them should be continued in the future. The International Bureau of Weights and Measures (dating from 1875), the Union for the Protection of Industrial Property (dating from 1883), the Union for the Protection of Artistic and Literary Works (dating from 1886), and the International Union for the Publication of Customs Tariffs (dating from 1890)—all of which were specifically mentioned and continued by the Treaty of Versailles in 1919—fall within this category, and others might be selected for inclusion. The provision in the Covenant of the League of Nations that "there shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent" produced but little effect, and a different approach may be needed in the future.

The Proposal makes specific reference to two Unions which are distinguished by their universality and outstanding in their success, and the services of which are easily appreciated by the general public.

Created in 1874, the Universal Postal Union has enlisted the day-to-day coöperation of seventy-two States, and it has assured an effective system of international postal exchanges throughout practically the entire world. Its congresses have met, almost uninterruptedly, at five-year intervals, the latest congress having been held at Buenos Aires in 1939. It maintains a permanent bureau at Berne.

The International Telecommunication Union was formed in 1932 as the successor to the International Telegraph Union created in 1865. Sixty-eight States have coöperated in its work. Its latest conference was held at Cairo in 1938. It also maintains a permanent bureau at Berne.

PROPOSAL 16

A General Secretariat, whose members should be independent of control by the States of which they are nationals, should be maintained to serve the needs of the General Assembly, the Executive Council, and the various agencies of the Community of States.

COMMENT

The history of international coöperation during the past hundred years has shown the necessity of permanent officials to carry on routine administrative work and to maintain constant contacts between Governments and international institutions. An international conference always needs a large staff, also, and people need to be trained for the work. Most of the earlier unions were provided with permanent bureaus, and in many cases the organization and supervision of the bureau was entrusted to a single Government; this system had some advantages, but it has tended to be superseded by international organization. In 1890 the first Conference of American States established a "Commercial Bureau of American Republics," under the supervision of the Secretary of State of the United States; this bureau was placed under the supervision of an international Governing Board in 1902, its name being changed to "Pan American Union" in 1910.

From the beginning of the League of Nations, a permanent Secretariat was maintained, composed of nationals of various States. Its members were chosen to "act, during their period of office, in an international capacity," and they were to be "not in any way representatives of their own country." Hence, the members were forbidden to "accept any honor or decoration" during their terms of appointment. Later Staff Regulations emphasized the international character of the service, and since 1932 officials have been required to make a formal declaration undertaking to regulate their conduct "with the interests of the League alone in view and not to seek or receive instructions from any Government or authority external" to the League.

For more than twenty years, this Secretariat has functioned with marked success, and its experience supplies a rich storehouse for the future to draw upon.

The proposed General Assembly and Executive Council would need the assistance of an international civil service, which should be organized as a General Secretariat. To maintain its independence of national control, the members should hold themselves free from direction by the States of which they are nationals, and such States should acknowledge a duty to refrain from attempting to direct them.

II. INTERNATIONAL DISPUTES

PROPOSAL 17

(1) The Permanent Court of International Justice should have jurisdiction over all disputes in which States are in conflict as to their respective legal rights and which are not pending before the Executive Council, such jurisdiction to be exercised upon an application by any party to the dispute. If the parties to a dispute have agreed upon another method of pacific settlement, the application to the Court should be possible only after the failure of the method agreed upon.

(2) The Court should be competent to decide any question as to its jurisdiction. Its decision of any such question and its judgment on the merits should be binding upon the parties to the dispute.

(3) In the event of a failure by any State to comply with a judgment of the Court, the Executive Council should have power to take such action as it may deem to be necessary for giving effect to the judgment. If the State which has failed to comply with a judgment of the Court is represented in the Executive Council, it should not be entitled to vote when the matter is under consideration.

COMMENT

For a half-century and more, international law has been moving toward the compulsory adjudication of international disputes. Most of the earlier treaties of this period contained but the barest tentatives in this direction. In the numerous treaties concluded under the inspiration of the Hague Peace Conference of 1899, progress was stifled for a time by the addiction of States to formulas such as those safeguarding their "national honor and vital interests." Yet the treaties were numerous in which States, particularly South American States, went further in providing for the compulsory arbitration of certain categories of disputes frequently described as legal disputes.

New lines of progress were opened up in 1920, when agreement was achieved upon the creation of a really permanent court.

The Committee of Jurists which drafted the Statute of the Permanent Court of International Justice proposed that it should be given an extensive compulsory jurisdiction over "cases of a legal nature," but in the Council

and Assembly of the League of Nations the representatives of a number of States were not prepared to go so far. In place of this proposal, an optional provision was included in the Court's Statute. At one time or another forty-seven States exercised the option, making declarations conferring on the Court compulsory jurisdiction over certain classes of legal disputes. Some of the declarations were made for varying periods of time, and in some instances their effect was limited by reservations. During the eighteen years of its activity, the Court exercised jurisdiction thus conferred in eleven cases, without any untoward incident.

Moreover, a large number of multipartite and bipartite treaties have been entered into, which confer compulsory jurisdiction on the Court; at least sixty-five States—including all of the States of the Western hemisphere—are parties to one or more of these treaties. Twenty-three States became parties to the 1928 General Act for the Pacific Settlement of International Disputes, which gave the Court wide jurisdiction over legal disputes.

This history would seem to indicate that the time has arrived when further progress can be made. The Proposal therefore envisages a general jurisdiction of the Court over legal disputes.

The formula of the 1925 Locarno treaties and the 1928 General Act is employed to describe legal disputes as "disputes in which States are in conflict as to their respective legal rights." Its effect is quite similar to that of the formula employed in many treaties of the United States of America, which provide for the arbitration of disputes "relating to international matters" in which the parties "are concerned by virtue of a claim of right made by one against the other under treaty or otherwise," and which "are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." The 1929 Inter-American Arbitration Treaty, to which sixteen American States are parties, applies to "differences of an international character which have arisen or may arise . . . by virtue of a claim of right . . . under treaty or otherwise," and "which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law."

The Proposal would apply only to "disputes." In the *Mavrommatis Case*, the Permanent Court of International Justice said that a dispute is "a disagreement on a point of fact or law, a conflict of legal views or of interests between two persons," and that "before a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations." In the *Chorzow Case*, however, the Court refused to require "the manifestation of the existence of the dispute in a special manner as for instance by diplomatic negotiations." In the more recent *Electricity Company Case*, the Court refused to deal with a claim as to which the applicant had not established the existence of a dispute.

The Covenant of the League of Nations refers to disputes "which cannot be satisfactorily settled by diplomacy"; the Locarno treaties apply to dis-

putes "which it may not be possible to settle amicably by the normal methods of diplomacy"; a series of treaties of the United States of America and the Inter-American Arbitration Treaty cover disputes "which it has not been possible to adjust by diplomacy," and the 1928 General Act is very similar. Under such formulas a party invoking the jurisdiction of a tribunal may have to show both the existence of a dispute and some attempt to bring about its settlement. In the *Mavrommatis Case*, the Permanent Court of International Justice took jurisdiction under a provision in the Palestine Mandate applying only "if the dispute cannot be settled by negotiation," saying that negotiations do not necessarily "presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short." In the *Chorzow Case*, the Court declared that it is "desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavored to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome."

States which are parties to a dispute should remain free to agree upon a special forum to which it may be submitted; if the method agreed upon does not result in a settlement, any party should be able to make application to the Court. In its declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice in 1921, the Netherlands Government confined its acceptance to disputes "in regard to which the parties have not agreed to have recourse to some other means of friendly settlement." The Belgian declaration of 1925 applied "except in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement." Similar reservations were made by other States.

The Proposal would also preclude an application to the Court with reference to a dispute pending before the Executive Council. In the Canadian declaration of 1929, as in various other declarations, the right was reserved "to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court," the suspension being for a limited period.

By making it possible for the Court's jurisdiction to be exercised upon an application by any party to a dispute, the Proposal would dispense with the necessity for a special agreement in each case. The requirement of a special agreement in each case, essential when a special tribunal has to be created, is not necessary when a permanent court exists; if it were insisted upon, no really compulsory jurisdiction would be possible, and any provision for jurisdiction would remain only an agreement to reach an agreement.

The Proposal emphasizes the competence of the Court to decide any ques-

tion as to its jurisdiction, a competence which has already been conferred on the Permanent Court of International Justice by its Statute.

Of course a judgment of the Court must be binding on the States which are parties to the case in which it is rendered. It defines or creates for them obligations under international law. Yet an international court does not have, and should not have, a staff of marshals or sheriffs to levy execution on its judgments. Their enforcement goes beyond the strictly judicial function which should be confided to a court.

If any enforcement of judgments is to be attempted, it should be entrusted to a body possessing a political responsibility. The Proposal would entrust it to the Executive Council, as a corollary of that body's general power to take cognizance of any State's failure to carry out its obligations under international law.

A precedent exists in the provision in the Covenant of the League of Nations that "in the event of any failure to carry out" an arbitral award or judicial decision "the Council shall propose what steps should be taken to give effect thereto." As no case has arisen in which a State has declined to carry out a judgment of the Permanent Court of International Justice, the Covenant's provision was never applied in practice.

PROPOSAL 18

(1) Acting upon its own initiative or at the request of any State, the Executive Council should have power to take cognizance of any dispute between two or more States which is not pending before the Permanent Court of International Justice.

(2) The Executive Council should have power to take such measures as it may deem to be necessary for preventing an aggravation or extension of the dispute; and, by majority vote, to request an advisory opinion of the Permanent Court of International Justice on any legal question connected with the dispute.

(3) If its effort to bring about a settlement of the dispute by the agreement of the parties is not successful, the Executive Council should have power, by unanimous vote, to give a decision which will be binding on the parties; failing such a decision, it should have power, by majority vote, to adopt and publish a report containing a statement of the facts and the recommendations deemed to be just and proper in regard thereto.

(4) If a party to the dispute is represented in the Council, it should not be entitled to vote when the dispute is under consideration.

COMMENT

Provision for the compulsory jurisdiction of the Permanent Court of International Justice over legal disputes clearly needs to be supplemented by a more general provision concerning disputes. The category of legal disputes does not include all of the differences which may arise to trouble the relations

of States. States may be in conflict as to matters other than their legal rights. Even in the event of a legal dispute, neither of the parties may make application to the Permanent Court of International Justice, and yet the continued existence of the dispute might menace peace and order.

A body not subject to judicial limitations should be empowered to deal in the general interest with disputes in any category. For this purpose, it is not necessary to distinguish between legal disputes and so-called "political disputes"—any dispute between States may become invested with political significance. Nor is it necessary to follow the Covenant of the League of Nations in setting off from other disputes those which are "likely to lead to a rupture." The vice of that distinction was exposed in two cases before the Council of the League of Nations which revealed that the question whether a dispute was "likely to lead to a rupture" depended on the amount of hostility shown by any one of the parties.

What is necessary is to appreciate that a strictly judicial body is of but limited usefulness in connection with international disputes, that any kind of a dispute may endanger the peace of the world, that menacing situations may arise which cannot be canalized as formal disputes, and that some international authority, of a political rather than a judicial nature, should have power to resolve disputes when required.

The Proposal would give the Executive Council power to take cognizance of a dispute of any kind, but the power would not extend to disputes actually pending before the Permanent Court of International Justice. The Proposal is corollary to those which would vest in the Executive Council general powers to take cognizance of any alleged failure by a State to carry out its obligations under international law, or of any use of force or threat to use force by a State in its relations with any other State; but in the exercise of these general powers, the Executive Council might take cognizance of the situation growing out of a dispute even though the dispute were pending before the Court.

The Executive Council should not have to wait until one of the parties brings the dispute before it. It should be able to proceed upon its own initiative, or at the request of any State. It was a weakness of the procedure for dealing with disputes outlined in Article 15 of the Covenant of the League of Nations that the Council could proceed only upon a request by a party to the dispute. Yet Article 11 of the Covenant declared it to be the "friendly right of each Member of the League to bring to the attention of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." In exercise of this "friendly right," Great Britain brought before the Council the Aaland Islands dispute between Finland and Sweden in 1920. The Washington representatives of nineteen American Republics acted upon their own initiative in 1932, in taking cognizance of the Chaco dispute between Bolivia and Paraguay.

The powers of the Executive Council should extend to taking the necessary measures for preventing an aggravation or extension of the dispute. The importance of conservatory measures was demonstrated by the experience of the Council of the League of Nations, particularly in the Greco-Bulgarian dispute in 1925, and the lessons of that experience were codified in an abortive Convention on Means of Preventing War of 1931.

The Executive Council should have power to request the Permanent Court of International Justice to give an advisory opinion on any legal question connected with a dispute, and a majority vote should be sufficient for making such a request. The question of the nature of the vote required for such a request by the Council of the League of Nations was never answered authoritatively, though a League Committee recommended in 1930 that a new paragraph be added to the Covenant stating that unanimity was not necessary.

The Executive Council would naturally seek to bring about a settlement of the dispute by the parties before attempting to arrive at a settlement in which the parties might not concur. If that effort is not successful, it should have power to give a decision which would be binding on the parties. Such a power would be so far-reaching, however, that it ought to be exercisable only by the unanimous vote of the Council, with the parties to the dispute not voting. If a unanimous decision were not possible, the Council should be empowered to adopt by majority vote a report which would state the facts and its recommendations with regard to them. Any refusal by a party to comply with a unanimous decision could be dealt with by the Executive Council under its general power to take cognizance of a failure by a State to carry out its obligations under international law.

The Proposal is limited to a vesting of powers in the Executive Council. It does not assume to indicate when these powers should be exercised. Such questions must depend on the situation at the time, and the wisdom of those who must deal with them. In a given case, either because of the setting of a dispute or its lack of gravity or importance, the Executive Council might decide not to take cognizance of a dispute; if its decision were in the opposite sense, however, the action to be taken would not need to follow any uniform pattern.

III. TREATIES AND PEACEFUL CHANGE

PROPOSAL 19

Every treaty or international engagement entered into by any State should be required to be registered with the General Secretariat upon its entry into force. The texts of all treaties or engagements registered should be published by the General Secretariat.

COMMENT

Secret treaties were a great hazard to international relations in times past, and during the war of 1914–1918 they led to wide insistence on open cove-

nants openly arrived at. It was in consequence of this insistence that a provision was included in the Covenant of the League of Nations that "every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it," and that "no such treaty or international engagement shall be binding until so registered."

The provision was generally observed by Members of the League of Nations. Even States not bound by the Covenant availed themselves of the privilege of registration; in 1920 Germany agreed to register its treaties, and in 1934 the United States of America took similar action. In consequence, 4821 principal treaties or engagements were registered at Geneva from 1920 to 1942. Under the practice adopted, the registration took place only when the instrument had entered into force.

It is notorious, however, that some treaties or engagements were not registered. The sanction of the Covenant that they should not "be binding until so registered," may have operated to encourage registration, but to a large extent it remained a dead letter.

The systematic publication of the texts of treaties and engagements under international auspices had been mooted long before 1919. An international conference met at Berne to consider the matter in 1892, but it produced no result. The 202 volumes of the Treaty Series published by the Secretariat of the League of Nations contain the complete texts, and where necessary English and French translations, of 4745 principal treaties or engagements, together with information as to action taken by States with reference to them.

A resolution adopted by the Eighth International Conference of American States in 1938 called for the registration with the Pan American Union of treaties concluded by the American States. Such registration was inaugurated in 1939, and down to June 30, 1943, 217 treaties had been registered by five States, 197 being registered by the United States of America. Texts of treaties registered are communicated to all the American States, but they are not otherwise published; lists are issued annually in the *Bulletin* of the Pan American Union.

The Proposal would preserve the very desirable innovation of the Covenant, and at the same time it would adapt the requirement to the actual practice.

PROPOSAL 20

Upon application by any party to the treaty or engagement, the Permanent Court of International Justice should have jurisdiction to give a declaratory judgment that an executory treaty or engagement has ceased, in whole or in part, to be binding in the sense of calling for further performance, if it finds that the treaty or engagement was entered into with reference to the existence of a state of facts the continued existence of which was envisaged

by the parties as a determining factor moving them to undertake the obligations stipulated and that this state of facts has essentially changed.

COMMENT

Most States are parties to scores of treaties with other States, and at any given time there are several thousands of treaties in force.

A treaty may impose an obligation which can be performed once and for all, and it becomes executed when that obligation is performed. Thus, if a State agrees to cede a particular territory to another State, the agreement will be executed when the cession has been made. On the other hand, a treaty may impose an obligation which calls for a future or continuing performance, and it will remain executory so long as the performance is due. Thus, if a State agrees to permit another State to maintain consuls within its territory, or to permit the nationals of another State to engage in business within its territory, the agreement continues to be executory until it is terminated. The same instrument may include both executed and executory provisions.

Some executory treaties provide for their expiration after a period of years, but in many cases no time-limitation is fixed. Some treaties provide that either party may denounce them, but in many cases no provision is made for denunciation. In a world of rapid changes, treaties are frequently revised to meet new conditions. If all the parties can agree upon the readaptation, no difficulty is presented; but if one of the parties refuses to coöperate in a readaptation insisted upon by another party, a troublesome situation may arise. The international law of the past has offered little assistance in dealing with such situations, and it needs to be supplemented.

It is a basic principle of international law, stated in the London Protocol of 1871 and reiterated in the Inter-American Convention on Treaties of 1928 and in a resolution of the Council of the League of Nations of 1935, that "no State can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, except as a result of the consent of the contracting parties, by means of an amicable understanding." This principle has been generally observed. Without it, a vast structure of treaty law would tumble.

Yet cases have not been rare in which States have sought to relieve themselves of treaty obligations by their own unilateral fiat, and they have sometimes sought to justify this course by invoking a change in circumstances. This ground for the termination of a treaty has had little support in the practice of States, and the doctrine has had but doubtful standing in international law. A mass of literature on the *clausula rebus sic stantibus* (an implied provision that a treaty is to bind the parties only so long as things stand as they are) has not led to any authoritative formulation of principle. A concept which readily lends itself to mis-statement and mis-application, which can so easily be made an excuse for a refusal to perform valid obligations, can be acceptable only within narrow and well-defined limits. Other-

wise it would create rancor and controversy which would imperil the legal relations of States.

The Proposal would apply only to an executory treaty, i.e., to one which calls for the performance of stipulated obligations to be begun or continued in the future. Adopting a careful formulation published in 1935, it would permit the application of the principle of changed circumstances only by an independent judicial body. It would set the following conditions to be judicially pronounced upon: (1) that the treaty or engagement had been entered into with reference to an existing state of facts; (2) that the continued existence of this state of facts had been envisaged by the parties at the time as a determining factor moving them to undertake the obligations stipulated; and (3) that this state of facts had essentially changed.

These conditions find some support in the judgment given by the Permanent Court of International Justice in the *Free Zones Case* between France and Switzerland in 1932. There the Court dealt with an argument that the stipulations establishing the zones had lapsed on the ground that the zones had been "created in view of and because of the existence of a particular state of facts" which had "disappeared"; finding that this argument had not been substantiated, that the parties did not "have in view" the state of facts which had changed, the Court declined to consider "the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law."

If it finds the conditions met, the Permanent Court of International Justice should have power to give a declaratory judgment that the treaty or any provision thereof has ceased to be binding in whole or in part. Such a judgment would effectively relieve the parties from the further performance of the obligations stipulated.

The Proposal is in line with a provision in the 1928 Habana Convention on Treaties, requiring arbitration in case any party to a treaty should seek to invoke its caducity. Its adoption would fill a gap in the existing law. It would give to a controverted principle a careful and restricted formulation; it would tend to obviate the anarchy under which States have sometimes purported to act as judges in their own interest; and it would provide a needed buttress to the structure of treaty-law.

PROPOSAL 21

(1) Acting at the request of any party to the treaty or engagement, the Executive Council should have power, by two-thirds vote and with the concurrence of the General Assembly given by two-thirds vote, to advise the revision by the parties of an executory treaty or engagement which it finds to be not adapted to existing conditions.

(2) If any party fails to collaborate in full good faith in the revision advised by the Executive Council, the Permanent Court of International Jus-

tice should have jurisdiction, on application by any other party, to give a declaratory judgment that the treaty or engagement has ceased, in whole or in part, to be binding in the sense of calling for further performance, if it finds that under the existing conditions the treaty or engagement has become unduly onerous to one or more of the parties.

COMMENT

The principle that treaties may be declared to have ceased to be binding because of changes in circumstances has been restrictively formulated, and cases may arise in which it would not be applicable but in which the revision of a treaty or engagement would be clearly desirable. If confusion and controversy are to be avoided, provision should be made for such cases. Yet it is important to avoid any undue disturbance of existing treaty relations, and States would zealously guard their freedom to make and to unmake their own treaties. Any procedure which may be laid down must be both rigid and restricted, and it cannot be too exacting.

Provision was made in the Covenant of the League of Nations that "the Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable." It was never decided that action could be taken by the Assembly under this provision by less than a unanimous vote, or that it could be taken without the concurrence of the parties to the treaty. In practice, no advice was ever given by the Assembly. Though the provision was hardly more than a dead letter, it may be thought to have had a harmful effect in that it was both illusory and disquieting.

The Proposal would apply only to an executory treaty or engagement, i.e., to one which calls for the performance of stipulated obligations to be begun or continued in the future. It would restrict the action to be taken by requiring a two-thirds vote in both the General Assembly and the Executive Council. It would thus assure careful consideration and a very general approval.

The action of the Executive Council would be limited to advising revision by the parties, and the advice could be given only after a finding that the treaty or engagement was not adapted to existing conditions. The Executive Council would not be empowered to revise a treaty; if the treaty is to be revised, the task should be left to the parties themselves. The advice would probably be very persuasive to the States parties to the treaty, but they would not be under a necessity of agreeing upon a revision. Collaboration in the revision advised should not be made positively mandatory, though the Proposal outlines a possible result of a failure to collaborate.

If one of the parties to the treaty or engagement fails to collaborate in the revision in full good faith after such advice has been given, any other party might apply to the Permanent Court of International Justice. The Court's finding of a failure to collaborate would be a condition of its juris-

diction. On the merits, the Court would have to find that the treaty or engagement had become unduly onerous to one or more of the parties before it could give a declaratory judgment that the treaty or engagement had ceased to be binding in whole or in part. Such a judgment would effectively relieve the parties from the further performance of the obligations stipulated.

PROPOSAL 22

Acting upon its own initiative or at the request of any State, the Executive Council should have power, by two-thirds vote and with the concurrence of the General Assembly given by two-thirds vote, to advise the re-adjustment of any situation the continued existence of which would endanger good understanding between States.

COMMENT

Apart from the cases in which a treaty or engagement may be declared to have ceased to be binding because of changes in circumstances, apart also from the cases in which the revision of a treaty or engagement may be advised, situations may exist which are such that, if continued, they would endanger peace or the good understanding between States upon which peace depends. Such situations might be territorial arrangements. They might have been produced by executed treaties, or they might have come to exist in the absence of any treaty. Their disturbing influence on international relations might be quite as menacing as that of an executory treaty or engagement.

Provision was made in the Covenant of the League of Nations that "the Assembly may from time to time advise . . . the consideration of international conditions whose continuance might endanger the peace of the world." At no time, however, was such advice given by the Assembly.

The Proposal would restrict the action to be taken by requiring the concurrence of the General Assembly given by two-thirds vote, as well as a two-thirds vote in the Executive Council. It would thus assure careful consideration and a very general approval. The action would be limited to advising the readjustment of a situation, and the advice could be given only after a finding that the continued existence of the situation would endanger good understanding between States.

In most cases, such advice ought to be very persuasive to the States within whose power the readjustment would lie. If it did not lead to a readjustment, further action by the Executive Council would be possible, either in virtue of its special power to take cognizance of any dispute to which the situation might give rise, or in virtue of its more general power to deal with any matter of concern to the Community of States.

PROPOSAL 23

The General Assembly should have power, by two-thirds vote and with the concurrence of the Executive Council, to amend the international instrument

creating the organization of the Community of States, provided that no amendment should become effective if objection is formally expressed within twelve months by as many as States.

COMMENT

Any international instrument creating an organization of the Community of States should be subject to amendment, and it seems desirable to find escape from the necessity of a unanimous agreement of all the parties before amendment can be effected.

The Covenant of the League of Nations provided that amendments should take effect "when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly"; it further provided that "no such amendments shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League." Seventeen protocols of amendment were drawn up after votes in the Assembly; fourteen were opened to signature in 1921, one in 1924, one in 1925, and one in 1938. Twelve of the protocols did not enter into force; four protocols drawn up in 1921 entered into force in 1924, and one in 1926. It is significant that two of the protocols which did not enter into force would have effected changes in the provisions for amendment: one would have required a three-fourths vote in the Assembly, including the votes of all the Members of the Council represented at the meeting, and ratification by all the Members whose representatives composed the Council at the time of the vote, and by a majority of the Members whose representatives form the Assembly; the other would have deprived a proposed amendment of any effect if the required number of ratification were not obtained within twenty-two months after the vote of the Assembly.

The Constitution of the International Labor Organization provides that amendments may be "adopted by the Conference by a majority of two-thirds of the votes cast by the Delegates present," to take effect "when ratified by the States whose representatives compose the Council of the League of Nations and by three-fourths of the Members." Only one amendment was adopted by the Conference; promulgated in 1922, it did not enter into force until 1934.

The Statute of the Permanent Court of International Justice failed to provide for its amendment, but amendments were adopted by a Conference of Signatories in 1929 and annexed to a protocol. Most of the States parties to the original Protocol of Signature proceeded to prompt ratification of the amending protocol. In 1935, when the ratifications of three States were lacking, the Assembly of the League of Nations requested the Council to put the protocol into force on February 1, 1936, "on condition that the States which have not already ratified have not in the meanwhile made objection";

as no such objection was made the amendments entered into force on the date fixed.

The 1928 Convention on the Pan American Union, which has been ratified by fourteen American Republics but which has not yet entered into force, provides for amendment, but requires the unanimous agreement of the twenty-one American Republics.

The Minority Treaties of 1919 and 1920 provided for amendment with "the assent of a majority of the Council of the League of Nations," and certain of the parties agreed not to object to an amendment thus assented to.

The 1933 Convention on Transport of Goods by Rail provides that an important annex to the Convention shall be "kept up to date" by a Committee of Experts on which all the parties may be represented, and that the decisions of the Committee of Experts may "be deemed to have been accepted unless within two months of the date of notification at least two Governments object thereto."

The Proposal would require for any amendment of the basic instrument creating the organization of the Community of States, both a two-thirds vote in the General Assembly and a unanimous vote in the Executive Council. It would dispense with the formality of signature and ratification, but it would permit later formal objection by any State. A State whose representative had voted against an amendment in the General Assembly might, on further reflection and in view of the general opinion, refrain from advancing an objection. Time should be allowed for such objections, and it is therefore proposed that no amendment should enter into force if formal objection is expressed, within twelve months, by a number of States to be determined.

APPENDIX I

States Existing in 1937 and their Populations

[Members of the League of Nations are listed as States; other States listed are clearly recognizable as such. The estimates of population, as of December 31, 1939, are from the *League of Nations Statistical Yearbook*, 1940–41, pp. 13–18.]

1.	China	(450,000,000)
2.	India	(382,000,000)
3.	Soviet Union	(172,000,000)
4.	United States of America	(131,416,000)
5.	Japan	(72,520,000)
6.	Germany	(69,317,000)
7.	Great Britain	(47,735,000)
8.	Italy	(43,864,000)
9.	France	(41,950,000)
10.	Brazil	(40,900,000)
11.	Poland	(35,090,000)
12.	Spain	(26,000,000)
13.	Mexico	(19,038,000)
14.	Turkey	(17,620,000)
15.	Egypt	(16,680,000)
16.	Yugoslavia	(15,703,000)
17.	Thailand	(15,600,000)
18.	Czechoslovakia	(15,239,000)
19.	Iran	(15,000,000)
20.	Rumania	(13,300,000)
21.	Argentina	(13,132,000)
22.	Canada	(11,368,000)
23.	South Africa	(10,251,000)
24.	Hungary	(9,129,000)
25.	Colombia	(8,986,000)
26.	Netherlands	(8,834,000)
27.	Belgium	(8,396,000)
28.	Portugal	(7,620,000)
29.	Greece	(7,201,000)
30.	Peru	(7,000,000)
31.	Afghanistan	(7,000,000)
32.	Australia	(6,997,000)
33.	Austria	(6,650,000)
34.	Bulgaria	(6,620,000)
35.	Sweden	(6,341,000)
36.	Nepal	(5,600,000)
37.	Ethiopia	(5,500,000)
38.	Chile	(4,940,000)
39.	Saudi Arabia	(4,500,000)

40.	Cuba	(4,253,000)
41.	Switzerland	(4,206,000)
42.	Denmark	(3,825,000)
43.	Iraq	(3,700,000)
44.	Finland	(3,684,000)
45.	Venezuela	(3,650,000)
46.	Yemen	(3,500,000)
47.	Bolivia	(3,400,000)
48.	Guatemala	(3,260,000)
49.	Ecuador	(3,000,000)
50.	Ireland	(2,946,000)
51.	Norway	(2,937,000)
52.	Haiti	(2,600,000)
53.	Liberia	(2,500,000)
54.	Lithuania	(2,442,000)
55.	Uruguay	(2,147,000)
56.	Latvia	(1,951,000)
57.	El Salvador	(1,745,000)
58.	Dominican Republic	(1,650,000)
59.	New Zealand	(1,642,000)
60.	Estonia	(1,122,000)
61.	Honduras	(1,090,000)
62.	Albania	(1,064,000)
63.	Paraguay	(970,000)
64.	Nicaragua	(883,000)
65.	Costa Rica	(639,000)
66.	Panama	(570,000)
67.	Danzig	(391,000)
68.	Luxemburg	(301,000)
69.	Iceland	(120,000)
70.	Monaco	(24,000)
71.	San Marino	(15,000)
72.	Liechtenstein	(12,000)
73.	Vatican City	(1,000)

Additional Populations in States' Dependencies

1.	Australia	(971,000)
2.	Belgium	(14,156,000)
3.	Denmark	(44,000)
4.	Egypt—Great Britain (Sudan)	(6,500,000)
5.	France	(71,641,000)
6.	Great Britain	(82,385,000)
7.	Italy	(3,302,000)
8.	Japan	(31,727,000)
9.	Netherlands	(69,719,000)
10.	New Zealand	(79,000)
11.	Portugal	(10,466,000)
12.	South Africa	(330,000)
13.	Spain	(1,000,000)
14.	United States of America	(18,767,000)

APPENDIX II

Activities of Pre-War States

State	Member of Postal Union	Member of Telecommunication Union	Sometime Party to the Covenant	Sometime Party to ILO Constitution	Party to Court Statute	Party to 1928 Paris Treaty	Party to an Opium Treaty
1. Afghanistan	x	x	x	x		x	x
2. Albania	x	x	x	x	x	x	x
3. Argentina	x	x	x	x			x
4. Australia	x	x	x	x	x	x	x
5. Austria	x	x	x	x	x	x	x
6. Belgium	x	x	x	x	x	x	x
7. Bolivia	x	x	x	x	x		x
8. Brazil	x	x	x	x	x	x	x
9. Bulgaria	x	x	x	x	x	x	x
10. Canada	x	x	x	x	x	x	x
11. Chile	x	x	x	x	x	x	x
12. China	x	x	x	x	x	x	x
13. Colombia	x	x	x	x	x	x	x
14. Costa Rica	x	x	x	x		x	x
15. Cuba	x	x	x	x	x	x	x
16. Czechoslovakia	x	x	x	x	x	x	x
17. Danzig	x	x				x	x
18. Denmark	x	x	x	x	x	x	x
19. Dominican Rep.	x	x	x	x	x	x	x
20. Ecuador	x	x	x	x		x	x
21. Egypt	x	x	x	x		x	x
22. Estonia	x	x	x	x	x	x	x
23. Ethiopia	x	x	x	x	x	x	
24. Finland	x	x	x	x	x	x	x
25. France	x	x	x	x	x	x	x
26. Germany	x	x	x	x	x	x	x
27. Great Britain	x	x	x	x	x	x	x
28. Greece	x	x	x	x	x	x	x
29. Guatemala	x	x	x	x		x	x
30. Haiti	x	x	x	x	x	x	x
31. Honduras	x	x	x	x		x	x
32. Hungary	x	x	x	x	x	x	x
33. Iceland	x	x				x	
34. India	x	x	x	x	x	x	x
35. Iran	x	x	x	x	x	x	x
36. Iraq	x	x	x	x		x	x
37. Ireland	x	x	x	x	x	x	x
38. Italy	x	x	x	x	x	x	x
39. Japan	x	x	x	x	x	x	x
40. Latvia	x	x	x	x	x	x	x
41. Liberia	x	x	x	x		x	x
42. Liechtenstein	(x)				(x)		x
43. Lithuania	x	x	x	x	x	x	x
44. Luxemburg	x	x	x	x	x	x	x
45. Mexico	x	x	x	x		x	x

State	*Member of Postal Union*	*Member of Telecommunication Union*	*Sometime Party to the Covenant*	*Sometime Party to ILO Constitution*	*Party to Court Statute*	*Party to 1928 Paris Treaty*	*Party to an Opium Treaty*
46. Monaco	(x)				(x)		x
47. Nepal							
48. Netherlands	x	x	x	x	x	x	x
49. New Zealand	x	x	x	x	x	x	x
50. Nicaragua	x	x	x	x	x	x	x
51. Norway	x	x	x	x	x	x	x
52. Panama	x	x	x	x	x	x	x
53. Paraguay	x	x	x	x	x	x	x
54. Peru	x	x	x	x	x	x	x
55. Poland	x	x	x	x	x	x	x
56. Portugal	x	x	x	x	x	x	x
57. Rumania	x	x	x	x	x	x	x
58. El Salvador	x	x	x	x	x		x
59. San Marino	x						x
60. Saudi Arabia	x					x	x
61. South Africa	x	x	x	x	x	x	x
62. Soviet Union	x	x	x	x		x	x
63. Spain	x	x	x	x	x	x	x
64. Sweden	x	x	x	x	x	x	x
65. Switzerland	x	x	x	x	x	x	x
66. Thailand	x	x	x	x	x	x	x
67. Turkey	x	x	x	x		x	x
68. United States of America	x	x		x		x	x
69. Uruguay	x	x	x	x	x		x
70. Vatican City	x	x					
71. Venezuela	x	x	x	x	x	x	x
72. Yemen	x	x					
73. Yugoslavia	x	x	x	x	x	x	x
Total	72	68	63	64	53	63	68

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THE UNITED STATES AND INTERNATIONAL AGREEMENTS

By Quincy Wright

Of the Board of Editors

There is no doubt but that the President can, with the consent of two-thirds of the Senate, make treaties binding the United States and compelling the House of Representatives, under penalty of sacrificing the good faith of the United States, to make such appropriations or to pass or to refrain from passing such laws as may be necessary to carry them out. The House has objected to being thus coerced on several occasions, but constitutional lawyers have not questioned the power of the President and Senate to act.[1]

The question on which there is doubt is whether this mode of making international agreements is exclusive. The position has recently been taken by Congressman Fulbright,[2] as it was taken by Jefferson [3] and by Madison [4] at an earlier period, that the treaty-making power of the President and Senate was never intended to deprive Congress of the concurrent power to give effect to international agreements or to authorize international agreements on subjects within its delegated powers.[4.1]

[1] Q. Wright, Control of American Foreign Relations, pp. 6, 226, 353–356; W. W. Willoughby, Constitutional Law, p. 483; S. B. Crandall, Treaties, their Making and Enforcement, p. 177; Alexander Hamilton, Works (Hamilton Ed.), Vol. 7, p. 566, and note 38, below.

[2] "It seems to me that an executive agreement ratified by joint resolution differs from a treaty largely in name only." New York Herald Tribune, Oct. 27, 1943.

[3] "The Constitution must have meant . . . to except (from the treaty-making process) those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better say others." (Thomas Jefferson, Manual of Parliamentary Practice, Sec. 52.) In excluding the field of delegated powers from "treaty-making" Jefferson has not been supported by practice, but his implication that the treaty-making power could not prevent Congressional authorization of agreements in this field has been supported. (Q. Wright, work cited, p. 123.) In pursuance of this implication, in view of the delegation of power to Congress to admit states to the Union and to regulate territory, Jefferson at first proposed to submit the Louisiana Purchase Agreement to Congress but was dissuaded by political considerations of the moment. (J. R. Hayden, The Senate and Treaties, 1789–1817, p. 139; Wallace McClure, International Executive Agreements, p. 47.)

[4] "In this particular case (the treaty-making power) a concurrence of two-thirds at least is made necessary, as a substitute or compensation for the other branch of the legislature, which on certain occasions could not be conveniently a party to the transaction." James Madison, "Helvidius" letter No. 1, Writings (Hunt Ed.), Vol. 6, p. 140; E. S. Corwin, The President's Control of Foreign Relations, p. 18; Sen. Merrick of Maryland, in Congressional Globe, Vol. 14 (1845), p. 322.

[4.1] The Jeffersonians in the House of Representatives suggested this position when they contended in the debate on the Jay Treaty, with the support of a majority of the House, that the discretion of the House in the exercise of its powers could not be impaired by the treaty-

This opinion contends that while the requirements of secrecy, speed, and sectional policy made it "convenient" to give the President and Senate the power to make treaties, the Senate at that time being a small body evenly balancing the sections, it was expected that this power would only be employed when circumstances required, and would not affect the capacity of "the whole Congress" to use its constitutional powers, in order to justify the President in using his constitutional power to negotiate with foreign Governments.[4,2] The text of the Constitution does not say that the "treaty-making" process is the exclusive method of making international agreements,[5] and in practice it has not been so.

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making power (Annals of Congress, 4th Congress, 1st Sess., 1795–96, especially remarks by Livingston, p. 427; Gallatin, p. 465; and Madison, p. 488). In answer to Washington's message of March 30, 1796, refusing the request of the House for papers on the negotiation of this treaty and stating the Federalist position that "the power of making treaties is exclusively vested" in the President and Senate, and that treaties so made must be carried out by Congress (p. 767), Madison thought "nothing more was necessary on this point than to observe that the Constitution had as expressly and exclusively vested in Congress the power of making laws, as it had vested in the President and Senate the power of making treaties" (p. 774). During the debate Congressman Holland said that the North Carolina Ratifying Convention in which he had participated adopted the Constitution only on the explicit understanding that the power of the President and Senate to make commercial treaties was qualified by the fact that "commercial regulations had been previously and expressly given to Congress and to them secured" (p. 546) (see also remarks by Brent, p. 580; Tracy, p. 625; and Madison, p. 778).

Fifty years later a majority of both Houses supported President Tyler's assurance that Congress had power to annex Texas after a treaty for this purpose had failed to gain the consent of the Senate (Message to House of Representatives, June 10, 1944). Spokesmen of the majority relied upon the power of Congress to admit new states to the union, to declare war, and to consent to compacts and agreements. On the latter point Congressman Bayly of Virginia pointed out that the Constitution referred to five distinct modes of making agreements with foreign nations—by treaty, by alliance, by confederation, by agreement, and by compact. Only the first mode was given to the President and Senate. The last two could be accomplished by the States with consent of Congress or, in his opinion, by Congress alone, and the other two, forbidden to the States, could be accomplished, he thought, by Congress. (Congressional Globe, Vol. 14 (1845), Appendix, p. 124. See also remarks in House of Representatives by Bowlin [Congressional Globe, Vol. 14, p. 140], in the Senate by Woodbury [p. 298], Merrick [p. 322], and McDuffie [p. 335], and below, note 11).

[4,2] Strictly speaking Congress can not delegate power to the President to make international agreements because it has no power to negotiate such agreements itself, but it can authorize the President to make an agreement by providing for execution of the agreement when made or by giving assurance that it will do so. (Q. Wright, work cited, p. 375.)

[5] It has been argued that it is explicitly not exclusive because the phrase "he shall have power" used in connection with treaty-making and recess appointments differs from the phrase "he shall," used in connection with nominations and appointments: see H. M. Catudal, "Executive Agreements, A Supplement to the Treaty Making Procedure," The George Washington Law Review, Vol. 10 (1942), p. 653. It seems, however, from an inspection of the whole of Art. II, Sections 2, 3 that this difference was not intended to distinguish between concurrent and exclusive powers but between discretionary and mandatory powers. The President "shall have power" to grant reprieves and pardons, but he "shall," be Commander-in-Chief, give Congress information on the state of the Union, receive am-

Most Americans have heard that the President can make treaties with the advice and consent of two-thirds of the Senate, and many have assumed that this is the only way he can make international agreements. Such people would be surprised to learn that less than two-fifths of some two thousand international agreements by which the United States has committed itself have been made by this "treaty-making process." Even those aware of this fact may say that agreements of importance, requiring the dignity of a full-fledged treaty, have been made by the treaty-making process. "Importance" and "dignity" are hard words to define, but the United States annexed Texas and Hawaii, ended the first world war, joined the International Labor Organization, the Universal Postal Union and the Pan American Union, settled over ten billion dollars worth of post-World-War I debts, acquired Atlantic naval bases in British territory during World War II, acquired all financial claims of the Soviet Union in the United States, joined the United Nations pledging itself not to make separate peace in world war II and to accept the Atlantic Charter, submitted over a score of cases to international arbitration, and modified the tariff in numerous reciprocal trade agreements, by means other than the treaty-making process.[6]

Attention has recently been directed to these alternative procedures in connection with Senate debates on a joint resolution implementing an executive agreement transferring title to certain lands in Panama to the Panamanian Republic,[7] on the agreement for a United Nations Relief and Rehabilitation Administration,[8] and on various proposals for amending the treaty-making provisions of the Constitution.[9] Congressional Committee discussions on the Master Lend Lease Agreements and the Declaration of the United Nations[10] have also dealt with the subject. Senators, while acknowledging a limited scope for executive agreements made by the President alone or with support of congressional resolutions, have for the most part insisted that "important" international agreements should be considered "treaties" and submitted for a two-thirds vote by the Senate.

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bassadors, take care that the laws be faithfully executed, and commission all officers. It is to be noted, however, that in cases where a discretionary power is clearly intended the phrase "he may" is used, as in connection with the requiring of the opinions of principal executive officers and convening and adjourning Congress in emergencies.

[6] McClure, work cited.

[7] Congressional Record, Vol. 89, pp. 9586–9608, 9641–50 (Dec. 3–4, 1942).

[8] Congressional Record, Vol. 89, pp. 7511–14 (July 8, 1943), Vol. 90, pp. 1737, 1746, 1826, 1840 (Feb. 16–17, 1944). See also Senator Joseph C. O'Mahoney, America is Being Made Over, Reader's Digest, Aug., 1943, and Kenneth Colegrove, The American Senate and World Peace, pp. 28 ff. 93 ff.

[9] See discussion by Senator Gillette of Iowa and Senator Pepper of Florida, Cong. Rec., Vol. 89, pp. 10708–10714 (Dec. 13, 1943). See also Colegrove, work cited, p. 170 ff.; Sol Bloom (Chairman of House Foreign Affairs Committee), The Treaty-Making Power, Washington, 1944, pp. 13–19; A. Barr Comstock, New York Times, May 7, 1944, p. 8 E.

[10] House of Representatives Committee on Foreign Affairs, Extension of Lend-Lease, Jan. 29–Feb. 23, 1943, pp. 106–115.

What is the constitutional law governing the making of international agreements? Four different opinions may be distinguished:

1. It has been contended on the basis of the provision of Article II of the Constitution that exclusive power to make international commitments is vested in the President acting with advice and consent of two-thirds of the Senate. This position, however, is hardly tenable, because the grant in this article is not explicitly exclusive, because the Constitution clearly recognizes a distinction between "treaties, alliances and confederations" which the States cannot make at all, and "compacts and agreements" which the States can make with the consent of Congress; [11] because the Supreme Court has unequivocally sustained the validity of international agreements made by the President with support of Congress [12] and by the President alone, even to the extent of declaring that they are of equal "dignity" with treaties and supersede State laws;[13] and because the practice of making executive agreements, initiated in the earliest days, has become firmly established. From 1789 to 1939 the United States entered into nearly two thousand international instruments of which only some eight hundred were made by the treaty process. The relative use of executive agreements has increased as indicated in the following table: [14]

[11] Constitution, Art. 1, Sec. 10, Cl. 1–3; Holmes *vs.* Jennison, 14 Pet. 540; U. S. *vs.* Rauscher, 119 U. S. 407; Green *vs.* Biddle, 8 Went. 1; Virginia *vs.* Tennessee, 148 U. S. 503; Q. Wright, work cited, p. 230; David M. Levitan ("Executive Agreements," in Illinois Law Review, Vol. 35 (1940), p. 369) and Weinfeld "What Did the Framers of the Federal Constitution Mean by Agreements or Compacts?", in University of Chicago Law Review, Vol. 3 (1936), p. 435 suggest that probably this distinction came from Vattel's Law of Nations (Sections 152, 153, 192) defining "compacts" as agreements to be executed by a single act. Practice, however, has given a more extensive meaning to compacts and agreements. (See Frankfurter and Landis, "The Compact Clause of the Constitution," in Yale Law Journal, Vol. 34 (1925), p. 695). See remarks by Senator Austin, Cong. Rec. Vol. 90, p. 1829 (Feb. 17, 1944), and above, note 4.1.

[12] Field *vs.* Clark, 143 U. S. 649, 1892; Hampton *v.* U. S., 1928, 276 U. S. 394; U. S. *v.* Curtiss-Wright Export Corporation, 1936, 299 U. S. 304. See also Memorandum by Attorney General Robert H. Jackson on Constitutionality of the Trade Agreement Act, February 29, 1940, Senate Committee on Finance, Hearings on Extension of Reciprocal Trade Agreement Act, 76th Congress, 3rd Sess., March 6, 1940, pp. 729–43: statement by Green H. Hackworth, legal advisor of Department of State, House Committee on Ways and Means, Hearings on Extension of Reciprocal Trade Agreement Act, 76th Congress, 3rd Sess., February 1, 1940, Vol. 3, pp. 2480–93; Report of Senate Committee on Finance, 76th Congress, 3rd Sess., March 8, 1940 (No. 1297) pp. 5–6; Report of House Committee on Ways and Means, 76th Congress, 3rd Sess., February 14, 1940 (No. 1594), pp. 34–36; 78th Congress, 1st Sess., May 5, 1943 (No. 409), pp. 47–48.

[13] U. S. *vs.* Belmont, 301 U. S. 324, 331, 1937; U. S. *vs.* Pink, 315 U. S. 203, 220, 1942. See also Watt *vs.* U. S. 1 Wash. Terr. 288, 294, 1870; Altman *vs.* U. S., 224 U. S. 583, 1912; McCall's Estate, 28 Pa. Dist. Ct. 433, 448, 1919, which suggest a more modest rôle for executive agreements; Q. Wright, work cited, p. 239; Catudal, work cited, p. 665 ff. An executive agreement, unless supported by Congressional action, cannot supersede earlier acts of Congress as can a "treaty." (See Senator Gillette, Cong. Rec., Vol. 89, p. 10711 (Dec. 13, 1943); Senator Taft, the same, Vol. 90, p. 1828 (Feb. 17, 1944); and Q. Wright, work cited, pp. 340, 375.

[14] McClure, work cited, p. 4.

	Treaties	*Agreements*
1789–1839	60	27
1839–1889	215	238
1889–1939	524	917
Total	799	1,182

2. It has been contended that the constitutional authority to make international agreements depends on the subject matter of the agreement. Within a certain field, it is said, the President can make treaties alone, on other matters he can make them with consent of Congress, and on still other matters he can make them only with the consent of two-thirds of the Senate.

It has been suggested that the President alone can make agreements within the scope of his administrative powers derived directly from the Constitution or from Congressional authority, within the scope of his military powers derived from his position as Commander-in-Chief, and within the scope of his diplomatic powers derived from his powers of receiving and sending diplomatic officers and of instructing negotiations.[15] Congress, it is suggested, can authorize agreements within the scope of its legislative powers,[16] and the President and Senate can make international agreements on "any matter which is properly the subject of negotiation with a foreign country." [17]

This theory cannot be called erroneous; it accords with the usual method of constitutional construction which insists that constitutional authority be found to justify action by any agency of the Government. It does not, however, clearly define spheres for the operation of these different methods because the powers of the President, the Congress, and the treaty-making authority overlap to a great extent. Matters within the administrative, military, and diplomatic powers of the President overlap with many of the powers of Congress, and the two together would appear to cover everything which "is properly the subject of negotiation with a foreign country," except possibly certain matters within the reserved powers of the States.[18]

The suggestion made from time to time that executive agreements are

[15] Q. Wright, work cited, pp. 235–46, 375.

[16] The same, 235–6.

[17] Geofroy *vs.* Riggs, 133 U. S. 258, 1890; Q. Wright, work cited, pp. 246–8.

[18] Levitan, work cited, p. 395; Q. Wright, work cited, p. 340 ff. This overlapping necessarily leaves the President discretion to decide which method shall be used and makes it impossible to define "treaties" and "executive agreements" except by the statement that "treaties" are international agreements submitted to the Senate for its advice and consent and "executive agreements" are all other international agreements made by the United States. See Senator Gillette, work cited, p. 10711, citing William B. Whittington of the Treaty Division, Dept. of State: Conference of Teachers of Int. Law, 1938, p. 5. Senator Taft of Ohio, during the Senate debate on the United Nations Relief and Rehabilitation Administration agreement tried to draw the line between treaties and executive agreements by distinguishing (1) minor international matters, such as postal arrangements, which could be dealt with by executive agreements, (2) important international matters which could only be dealt with by treaty, (3) domestic matters on which, if within its delegated powers, Congress could authorize the President to make executive

obligations of lesser validity, binding only the President but not Congress, has not been accepted by other States. In international law the State is the unit and is bound as a unit.[19] In practice, treaties and executive agreements have been treated as having the same force in both international law and domestic law; both have been held to supersede State laws,[20] and both can be terminated as far as domestic law is concerned by act of Congress.[21]

3. It has been contended that Congress is the sovereign authority in the central government, and that consequently it has authority to determine how international agreements shall be made apart from explicit constitutional grants to other bodies. This position was supported by statements in the early days by Jefferson, Madison, and others, suggesting that the procedure which involved the two-thirds vote in the Senate was merely an alternative which the President could "utilize on certain occasions" when the House of Representatives could not be "conveniently a party to the transaction" because of the need for secrecy or dispatch.[22] This theory is also supported by the explicit grant of powers to Congress respecting most matters within the scope of treaty making. From this Jefferson inferred that the treaty-making procedure involving action by the President and Senate could not extend to "those subjects of legislation in which it gave a participation to the House of Representatives." He adds, "This last exception is denied by some

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agreements, and (4) executive and military matters upon which the President could make executive agreements which, however, could only control his own policy, not that of Congress or of future Presidents (see below, notes 19–21). The difficulty of applying these distinctions in practice was illustrated in the Senator's speech. He said he considered the recent executive agreements on Panamanian land titles and reciprocal tariff reduction so important that they should have been made by treaty but he acknowledged that the majority of his colleagues had thought differently and had supported legislation to implement them. He also considered that the reciprocal trade agreements were outside of the "domestic" legislative powers of Congress because they purported to bind the United States for three years while Congress could not bind its own future action, but here again the general opinion of the Senate had been against him. He considered the UNRRA agreement to be a "part of the war effort" within the President's military powers but others thought that, since it involved mainly appropriations, it was within the "domestic" powers of Congress (Cong. Rec. Vol. 90, pp. 1827–9 (Feb. 17, 1944). Opinions are likely to differ on what is "important" and what "minor." "Domestic" legislation as used in United States practice has both authorized and abrogated international agreements and has precipitated claims by foreign governments on the ground that it has violated international law. (See Q. Wright, work cited, p. 263 ff.) But as used in international law and the League of Nations Covenant (Art. 15, par. 8) "domestic jurisdiction" refers to matters which do not affect the state's obligations under international law or treaties. (Per. Ct. Int. Jus., Tunis Nationality Decrees case.)

[19] Q. Wright, work cited, pp. 9, 66, 235, 358; Levitan, p. 394.

[20] Above, note 13.

[21] Chinese Exclusion Cases, 1889, 130 U. S. 581; Pigeon River Co. *v.* Cox, 1933, 291 U. S. 138; Q. Wright, work cited, pp. 17, 162.

[22] Madison, work cited, pp. 147–150; Corwin, work cited, p. 19; Q. Wright, work cited, p. 138; David J. Lewis, Hearings, the World Court, House of Representatives Committee on Foreign Affairs, May 20, 1932; also note 4, above.

on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others." [23] This passage from Jefferson's Manual still appears in both the Senate Manual and the Rules of the House of Representatives, and has been applied by the Senate on at least one occasion to defeat a treaty whose subject matter was within Congressional competence.[24]

This theory is also supported by the action of Congress in professing to forbid the President and Senate to make certain types of treaties,[25] to terminate treaties by joint resolution,[26] to make particular agreements on such topics as the annexation of Texas and Hawaii and the termination of World War I, when the treaty-making process had failed or there were grounds for thinking it would; [27] and to authorize or approve executive agreements on many topics such as tariffs, postal correspondence, participation in international organizations, conclusion of international financial settlements, and acquisitions of territory and naval bases.[28]

This theory of Congressional predominance would hardly sustain congressional power to authorize treaties on subjects outside the delegated powers of Congress, a field into which the treaty-making power has entered with approval of the Supreme Court.[29] President Washington's message refusing to submit papers on the Jay Treaty on request of the House of Representatives may also be cited in opposition to this theory. On this occasion Washington stated that it was clear from a vote in the Constitutional Convention that the House of Representatives did not share in the treaty-making power. The vote to which he referred excluded the House of Representatives from the treaty-making process as described in Article II, but it would hardly prove that the Congress as a whole would not have a general power to authorize international agreements on subjects within its delegated powers. The real issue involved in the Jay Treaty controversy concerned not the power to make treaties but the duty of the House to assist in carrying out a treaty already made by the President and Senate. Washington felt that when the Treaty had been made by the "treaty-making

[23] Above, note 3.

[24] Crandall, work cited, 189–90; Q. Wright, work cited, pp. 102, 344. See note on participation of House of Representatives in the making, execution and termination of treaties: Rules of the House of Representatives, Washington, 1943, pp. 269–270.

[25] By an act of 1871 Congress forbade the making of further treaties with the Indian tribes, J. B. Moore, Digest of International Law, Vol. 5, p. 220. Q. Wright, work cited, p. 234.

[26] Q. Wright, work cited, p. 258.

[27] McClure, work cited, pp. 11, 62–70; Q. Wright, work cited, pp. 291–3; Hunter Miller, Treaties and other International Acts of the United States, Vol. 4, p. 702 ff.

[28] McClure, work cited, pp. 35–189; Q. Wright, work cited, p. 236.

[29] Ware *vs.* Hylton, 3 Dall, 199, 1796. In Missouri *vs.* Holland, 252 U. S. 416, 1920, the Court recognized the power of Congress to pass laws necessary and proper to carry out a treaty even though, in the absence of the treaty, it would lack power to deal with the subject. See also Neeley *vs.* Henkel, 180 U. S. 102, 121, 1900.

process" Congress had no concern with the papers which dealt with its making.[30]

It seems clear that Congress can suggest treaties but cannot compel the President to negotiate them.[31] It can terminate treaties so far as domestic execution is concerned,[32] or refuse to take the necessary measures to implement them,[33] but such action would be at the expense of the obligations of the United States under international law.[34] Congress cannot itself make international agreements since the negotiating power is vested exclusively in the President,[35] but its coöperation is indispensable for carrying out many agreements, and there are very few agreements which the President cannot in fact make and carry out if he is supported by a majority of both Houses of Congress.[36]

4. Finally, it has been contended, on the grounds that the making of international agreements is by nature an executive function, that the power rests inherently in the President, and that he can make international agreements on any subject whatever, limited only by the qualification that he ought not to engage the good faith of the United States to something which may not be carried out. This theory rests on a distinction between Constitutional *powers* to act effectively, derived explicitly or implicitly from the law of the Constitution, and the Constitutional *duty* not to act improperly, derived from Constitutional understandings and conventions or resulting from the relationship among these powers.[37] Since many international engagements, as for instance those requiring appropriations or criminal prosecutions, cannot be carried out without Congressional action, the President, it is said, ought not to make an agreement on such subjects unless he has reasonable assurance that Congress will take the necessary action to carry it out. Such assurance may be given by a prior joint resolution, or, less satisfactorily, by the conclusion of the agreement as a formal treaty with consent of two-thirds of the Senate. The latter procedure makes the agreement "supreme law of the land" under Article VI of the Constitution, but it does not give complete assurance that the House of Representatives will actually perform the required acts to carry it out. In fact the House has several times taken the position that on such matters as appropriations it can exercise discretion in considering measures to implement a treaty.[38]

With respect to judicial action the courts have made little distinction between treaties and executive agreements. Either, when concluded under authority of the President, has been held to make Federal law superseding

[30] Q. Wright, work cited, pp. 62, 246; above note 4.1.
[31] Same, pp. 248, 528, 279, 281.
[32] Same, p. 260; above, note 21.
[33] Q. Wright, work cited, pp. 253–56.
[34] Same, pp. 6, 356.
[35] Same, pp. 21–26, 28–37, 233.
[36] McClure, work cited, 362–3; Levitan, work cited, pp. 394–5.
[37] Q. Wright, work cited, pp. 6–9; 341 ff.
[38] See House Resolutions concerning appropriations to carry out the Jay Treaty (1796) and the Alaska Purchase Treaty (1867); Q. Wright, work cited, pp. 6, 226.

State laws.[39] It has been suggested that the word "treaty" in Article VI of the Constitution is not necessarily confined to instruments concluded by the treaty-making process in Article II, but may include any instrument to which the United States is bound under international law. The fact that Article VI makes "supreme law of the land," "treaties made under the authority of the United States," while acts of Congress have this character only if made "in pursuance of the Constitution," adds weight to this contention,[40] though the distinction was undoubtedly intended to assure the legal supremacy of the treaties already made "under the authority of the United States" before the Constitution went into effect.[41]

According to this theory judgment upon the Constitutional propriety of the President's act in making any agreement depends upon the *degree of risk* that Congress or a subsequent President would reverse the policy of the agreement by positive action or by failure to pass the necessary legislation. The term "Constitutional propriety" is used because, in view of the political character of the conduct of international relations the courts have refused to draw legal lines. The scope of the President's power in this field is considered to be a political question upon the limits of which he himself is the judge at least in the first instance.[42] It could never be said that the President was definitely acting contrary to Constitutional law in making an executive agreement unless it was absolutely certain that the agreement would not be carried out. On the other hand the President would be taking a serious step if he committed the United States internationally to something without reasonable assurance that it would be carried out. It is an "understanding" of the Constitution that the President ought to be reasonably certain that he has, or will have, at the proper moment, the support of all agencies of the country whose coöperation is necessary to implement it, before he makes an international commitment. If he fails to observe this understanding he is guilty of a Constitutional impropriety.[43]

This theory seems to be most in accord with the history, theory, and practice of the Constitution. Historical sources indicate that the Federal Convention of 1787 gave power to the President with two-thirds of the Senate to make treaties with the object of facilitating speed and secrecy in treaty making at a time when it was thought the Senate would be a very small

[39] Above, note 13.

[40] See Altman *vs.* U. S. 224, U. S. 503, 1912; Mo. *vs.* Holland, 252 U. S. 416, 1920; D. J. Lewis, Congressional Record, Vol. 54 (1917), p. 3508, p. 4205; Q. Wright, work cited, p. 57.

[41] This interpretation is supported by Art. III, sec. 2, of the Constitution which extends the judicial power to "all cases in law or equity arising under the Constitution, the laws of the United States, and treaties *made* or which shall be made, under their (the United States') authority."

[42] Martin *vs.* Mott, 12 Wheat 19; Jones *vs.* U. S., 137 U. S. 202, 212, 1890; Pearcy *vs.* Stranahan, 205 U. S. 257, 1907; U. S. *vs.* Curtiss-Wright, 299 U. S. 304, 1936; Q. Wright, work cited, p. 172, 215.

[43] Q. Wright, work cited, p. 349.

body and would serve as an executive council.[44] The two-thirds vote was in part a carry-over from the Articles of Confederation, but it also manifested a desire to make treaty making difficult and to prevent one section of the country from giving away by treaty a claim of great interest to another section.[45] Specifically, the South wished to prevent the sacrifice of the alleged right to navigate the Mississippi (still in Spanish hands), while New England wished to be in a position to prevent a sacrifice of the alleged fishery rights in the waters of Newfoundland and Labrador.[46]

It is also unquestioned that explicit proposals to attach the House of Representatives to the treaty power were voted down.[47] This historic fact, however, only proves that the Convention wished to make it possible for the President to make treaties without submission to the House. It does not prove that the Convention intended to prevent Congress from exercising its Constitutional powers to authorize or implement international agreements made by the President alone.

Jefferson, in principle no friend of executive prerogatives, said: "the transaction of business in foreign nations is executive altogether." [48] The President is clearly the representative organ who alone speaks authoritatively for the United States in international affairs.[49] It is also clear, however, that the President alone cannot carry out all international agreements. The result is that the President, while enjoying power to make agreements on any subject, is limited by the Constitutional understanding that he respect the good faith of the United States and the Constitutional discretion of other organs of the government.

A review of Constitutional history indicates that no subject has been more controversial than that of treaty-making. President Washington found, on his first consultation with the Senate on a treaty, that it would not function as an executive council and consequently he adopted the practice, generally followed by his successors, of negotiating treaties and submitting them to the Senate when completed. The Senate began its practice of proposing amendments to treaties as early as the Jay Treaty of 1794, and in connection with the same treaty the House passed a resolution declaring its freedom to refuse appropriations called for by a treaty. The contest between the President, the Senate, and the House was thus inaugurated,

[44] Same, pp. 364–5. In the original Senate of 26 the difference between a majority (14) and two thirds (18), was only four Senators, a point commented on by Senator McDuffie of South Carolina during the Texas annexation debate (Congressional Globe, Vol. 14 (1845), p. 335).

[45] Q. Wright, work cited, p. 264; W. Stull Holt, Treaties Defeated by the Senate, p. 1 ff.

[46] Charles Warren, the Mississippi River and the Treaty Clause of the Constitution, George Washington Law Review, Vol. 2 (1934), p. 271; Catudal, work cited, p. 653; R. E. McClendon, Origin of the Two-Thirds Rule in the Senate Action upon Treaties, American Historical Review, Vol. 36 (1931), p. 768; W. S. Holt, work cited, p. 8; C. C. Tansill, The Treaty Making Power of the Senate, this JOURNAL, Vol. 18 (1924), p. 459; Bloom, work cited.

[47] Livingston Farrand, Records of the Federal Convention, Vol. 2, p. 538; Q. Wright, work cited, p. 246; below, note 55. [48] Q. Wright, work cited, p. 137. [49] Same, pp. 21–27.

and this contest has, throughout American history, been involved in party manoeuvers.[50] In the 1790's the Federalists controlled two-thirds of the Senate but not the House. Consequently, they attempted to insist that the making of international agreements belonged to the President and Senate alone. The Jeffersonian Republicans, on the other hand, who were weak in the Senate, insisted that the powers of Congress as a whole could not be encroached upon by the treaty-making power and that Congress was competent to approve action in the international field within the scope of these powers.[51]

While the Senate achieved a dominant position in the mid-nineteenth century and established a tradition that on important matters treaties could only be made with its consent and that the House was excluded, this position was from time to time successfully contested, as, for instance, in the Texan case. The advocates of annexation through joint resolution justified this procedure from the power of Congress to declare war and consent to compacts and agreements, as well as from its power to admit new states to the Union. According to Congressman Bayly of Virginia, "It has always been admitted, in the administration of the government, that the power to declare war carries with it the power of doing whatever tends directly to prevent it. When the consent of Congress is required to authorize a State to enter into an agreement or compact with a foreign state, it presupposes the existence of a power in Congress to do it." [52] Obviously these constructions would give Congress power to authorize a very wide range of international agreements.

The character of this three-cornered controversy as it emerged, with at least a temporary victory for the Senate at the end of the nineteenth century, is indicated by the following note to the United States Minister in London, by Richard Olney, just after retiring as Secretary of State, in May 1897, during the struggle over the general arbitration treaty with Great Britain: "The Senate is now engaged in asserting itself as the power in the national government. It is steadily encroaching on the one hand on the executive branch of the government, and on the other on the House of Representatives. . . . This coërcive attitude of the Senate toward other departments of the government is largely responsible for the treatment it has given the general arbitration treaty. . . . It must be either altogether defeated or so altered as to bear an unmistakable Senate stamp—and thus be the means both of humiliating the executive and of showing to the world the greatness of the Senate.[53]

[50] See Hayden, work cited; Corwin, work cited, p. 84 ff; Holt, work cited; Q. Wright, work cited, p. 360 ff.; Bloom, work cited.

[51] Holt, work cited, pp. 17–18; above, note 4.1.

[52] House of Representatives, Jan. 7, 1845, Congressional Globe, Vol. 14, Appendix, pp. 122, 124; above, note 4.1.

[53] Henry James, Richard Olney, p. 150; G. H. Haynes, The Senate of the United States, Vol. 2, p. 657; Holt, work cited, p. 159.

As early as 1884 Woodrow Wilson had written prophetically: "During the single Congressional session of 1868–69, for example, the treaty-making power of the Senate was exerted in a way that made the comparative weakness of the Executive very conspicuous and was ominous of very serious results." Eight treaties including those for reciprocity with Hawaii, purchase of Virgin Islands, Alabama Claims and Fuca Strait Boundary were defeated in the session.[54]

The controversy became particularly acrimonious during the twentieth century because the more important position of the United States in world affairs made treaties more necessary, and examination of the Senate's record in treaty-making raised grave doubts as to the character of its influence.[55] It was pointed out that the two-thirds rule gave the minority party power to embarrass the administration by defeating a treaty wholly apart from its merits, and that this power of the minority party was frequently used. It also appeared that the desire of the Senate to maintain its prestige and to humiliate the Executive was frequently a factor influencing the votes of Senators apart from the considerations of the merits of the treaty. Particular personal, state, or sectional interests often entered into Senate votes in a way to frustrate the general opinion of the country.[56]

[54] Woodrow Wilson, Congressional Government, p. 50; Holt, work cited, p. 107.

[55] In the early days the relatively isolated situation of the United States seldom required the making of treaties. The presumption was in favor of the *status quo*. In such a situation, as Jefferson observed, a difficult procedure for treaty-making protects the general opinion against ill-considered measures. In the twentieth century, on the other hand, close international contacts and the need for continuous adaptation of treaty relations to rapidly changing conditions require frequent treaties. The presumption favors change. In a situation requiring positive action a requirement for extraordinary majorities means minority rule. Even in the Federal Convention it was recognized by Madison and others that the termination of a war necessarily involved positive action and consequently they proposed that treaties of peace should only be made by majority vote of Congress. This proposal was not approved because of the reluctance of many to make participation of the House of Representatives necessary. Roger Sherman of Connecticut in the Convention particularly stressed the need for secrecy as did Hamilton and Jay in the Federalist. Sherman, however, saw that the two-thirds rule would be "embarrassing" and proposed to substitute a simple majority of the entire Senate. This proposal lost by a vote of five to six. A shift of one vote would have prevented what John Hay called "the irreparable mistake of the Constitution" (see Gillette, work cited, 10710; Max Farrand, The Records of the Federal Convention of 1787, New Haven, 1911, Vol. 2, pp. 538, 540, 549).

[56] The motives of the Senate in defeating treaties are examined in detail by Holt, work cited, who concludes:

"The fate of the Treaty of Versailles turned the attention of thoughtful people to the treaty-making power of the United States. They saw that the exercise of that power had produced such bitter conflicts between the President and the Senate and had so increased the opportunities for political warfare unconnected with the merits of the question that many treaties had been lost. They knew that the ratification of nearly every important treaty had been endangered by a constitutional system which, instead of permitting a decision solely on the merits of the question, produces impotence and friction. They realized that if no disaster had resulted it was due partly to good fortune and chiefly to the relative unimportance of foreign relations in the history of the United States so that few treaties had contained vital

As a result of these motives in the Senate, the treaty-making process had resulted in the outright defeat of some treaties which were generally desirable, in the amendment of others frequently causing considerable irritation to the other country, and in occasional long delays. Statistical summaries of some one thousand formal treaties negotiated by the Executive to date indicate that about a quarter were never perfected and that of this 250 unperfected treaties some 50 were withdrawn or not ratified by the President, some 75 were killed by Senate amendments unacceptable to the President or to the other power, and about 125 were killed by Senate rejection or inaction. While in less than a dozen of these cases can it be definitely stated that the two-thirds rule was responsible for the outright defeat of the treaty, it is clear that this rule was responsible in the case of a very large number of treaties which failed because of Senate amendment or Senate inaction. The latter category includes all treaties not returned by the Senate to the President, and this often resulted from the fact that the treaty could not command the two-thirds necessary for approval, while, on the other hand, the opposition could not command a majority to return it to the President.[57] The rule introduced in 1868 requiring only a majority vote on amendments and reservations increased the obstructive power of the Senate because a small minority might be able to join with reservationists to defeat the treaty indirectly by emasculation if they could not do so directly.[58]

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issues. They also realized that, if the United States was to play the part in world affairs demanded by its interests and its strength, a deadlock between the President and the Senate over a treaty involving a really critical foreign problem may end in ruin."

Equally drastic criticism has come from the Senate itself. After referring to the possibility that Senators representing one-twelfth of the population might defeat a treaty, Senator Gillette of Iowa said in the Senate, supporting an amendment providing for majority rule: "I have just directed attention to the obstructive force of a minority based on population. How much more dangerous and destructive would be a situation where all the efforts of our executive department and the will and wish of two-thirds of this body, less one, could be thwarted by a small group of Senators who were offensively partizan, or by a similar small group of arbitrary radicals, or a similar small group of hard-headed reactionaries, or by any other group small and compact, motivated by partizan antagonisms, political prejudices, or personal antagonism and ill will against an Executive, based on resentments which found their genesis in campaign contentions, patronage distribution, or equally unworthy situations." He added, "I don't think so meanly of my colleagues in this body as to believe that they would be actuated by any such despicable motives, but I cannot close my eyes to the record of our national history." Cong. Rec., Vol. 89, p. 10709 (Dec. 13, 1943). "The historical evidence," he said later, "certainly should convince us that our Chief Executives have been given much cause for being sceptical and reluctant in the matter of laying international pacts before the Senate for ratification as treaties" (Same, p. 10712). See also Colegrove, work cited, pp. 15–24, 55 ff.; Bloom, work cited, pp. 8, 18.

[57] See Department of State, List of Treaties Submitted to the Senate, 1789–1931, which have not gone into Force, Washington, 1932; Haynes, work cited, Vol. 2, p. 603; Royden Dangerfield, In Defense of the Senate, Norman, pp. 151, 252.

[58] "The Senate can amend, change, emasculate, mutilate or completely destroy a treaty proposal by a majority vote, but cannot give it approval in any form except by a two-thirds vote of assent." Senator Gillette, Cong. Rec., Vol. 89, p. 10711 (Dec. 13, 1943).

This statistical account does not however indicate the full effect of the two-thirds rule. The treaties defeated by the Senate have been more important than the average. In the field of international organization, pacific settlement, and the prevention of war, the Senate veto has prevented important action by the United States since defeat of the proposed arbitration treaty with Great Britain in 1897.[59] Of great importance also has been the effect of discouraging the State Department from negotiating agreements on important projects even when supported by predominant public opinion in the nation, through fear of the one-third veto in the Senate.[60]

This criticism of the Senate, as well as a wide-spread feeling that a more democratic process of treaty making is desirable,[61] has resulted in numerous proposals for Constitutional amendment and also in an increase in the practice of utilizing executive agreements and joint resolutions in making international commitments. The Senate's tradition and prestige, however, seem to have obscured from Constitutional jurists the opinion, earlier held, that the treaty process was intended only as an alternative, and that Congress is free to exercise its delegated powers in supporting or authorizing agreements made by the President.[62]

[59] See D. F. Fleming, "The Rôle of the Senate in Treaty Making; a Survey of Four Decades," in American Political Science Review, Vol. 28 (1934), p. 583 ff. George Wickersham, former Attorney-General wrote (Foreign Affairs, Vol. 2 (1923), p. 187): "The conduct of foreign relations will be almost impossible of satisfactory direction if the Senate shall continue in future to interfere with and hamper the Executive as it has done the last four years. . . . The fact is the treaty-making machinery of the United States has become so complicated as to be almost unworkable." Among the treaties killed by the Senate during this period have been the Hay Arbitration Treaties, the Knox-Taft Arbitration Treaties, and treaties providing for American participation in the League of Nations, the Permanent Court of International Justice, and the Geneva Arms Trade Convention.

[60] DeWitt Poole, "Coöperation Abroad Through Organization at Home," in Annals of the American Academy of Political and Social Science, July, 1931; Proceedings of the American Philosophical Society, Vol. 72 (1943), pp. 77–86; Haynes, work cited, p. 660; D. F. Fleming, The Treaty Veto of the American Senate, pp. 266–68.

[61] McClure, work cited; Colegrove, work cited, pp. 11 ff, 49 ff, 99 ff; Q. Wright, work cited, pp. 362, 368.

[62] The present writer in 1922 gave insufficient weight to the possibility of using "executive agreements" supported by Congress as practical alternatives to "treaties" in most cases. (See work cited, pp. 235, 368, note 26.) The development of Congressional and executive practice, and of judicial opinion, as well as historical research, has thrown new light on the question since that date. (See Levitan, work cited.) Professor Colegrove, while recognizing the practicability of using the Executive-Congressional process for matters within the delegated powers of Congress, fears that instruments made in this way may lack the "symbolical significance" of treaties and may be regarded as "evasions of the fundamental law" (work cited, pp. 106, 110). These fears, which should be dispelled by a more complete examination of the law and history of the subject, were shared by Senator Vandenburg (Mich.) and Taft (Ohio) during the debate on the UNRRA agreement: Cong. Rec., Vol. 90, pp. 1749, 1826 (Feb. 16–17, 1944). Senator Taft regarded Senator Vandenburg's suggestion that the UNRRA agreement was an "executive-congressional agreement" different from either an "executive agreement" or a "treaty," as a novel suggestion which he could not accept. He considered it an "executive agreement," a form of instrument which he re-

The conclusion may be drawn that in the making of international agreements, particularly those concerned with the conclusion of peace and establishment of institutions for perpetuating it, the matter rests in a very real sense in the hands of the President and the people. The President has ample legal power to negotiate on these subjects, and ample political power if he can command a majority in both Houses of Congress. He can command that majority for a peace which the public clearly desires. The difficulties which have in the past been found in the two-thirds vote in the Senate appear to have risen from political timidity and Constitutional misapprehension. There has never been any Constitutional bar to concluding international agreements within the scope of Congressional power if desired by the President and a majority in both Houses. Not only is it legally permissible to by-pass the two-thirds rule, but it is politically practicable. If the President can command a majority of both Houses the necessary appropriations and laws can be passed to implement any international agreement within the powers of Congress and a Senate minority is powerless to prevent it.[63]

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luctantly acknowledged was fully supported by practice and judicial precedent if confined to its proper field. (See note 18 above.) In his opinion Congress was asked by the pending resolution to participate, not in making the agreement, but in executing it. (Same, pp. 1746, 1827.) On this he was supported by Senator Connally (Tex.), Chairman of the Foreign Relations Committee, who had presented the resolution (p. 1756). Neither of them, however, recognized the relationship between the propriety of Presidential conclusion of such agreements and the probability of Congressional support for their execution.

[63] After citing the practice in regard to executive agreements and treaties and the judicial decisions on the subject Senator Gillette says: "It would be a logical conclusion that a decision not to submit to the Senate an agreement with a foreign power, even one of as high import as a treaty of peace, could not properly be questioned in any judicial proceedings for mandatory action" (p. 10713). He felt that termination of a war by prolonged armistice without peace treaty would amount to a *coup d'état* but he did not discuss the approximation to such a procedure involved in the fact that World War I really ended by the joint resolution of July 2, 1921. Senator Gillette's comment that, if the above-stated opinion concerning executive agreements is true, reference in the Constitution to the treaty-making process is "irrelevant, superfluous, and mere verbiage" (p. 10713), overlooks the main intent of this process, namely, to make it possible for the President to by-pass the House of Representatives in the interest of secrecy and dispatch if that seems expedient. It was thought that the President would usually wish to do this because it was assumed that he would use the Senate as an executive council during the course of negotiations and so would be assured of its speedy consent: Bloom, work cited, pp. 10–12, 16.

THE OPTION CLAUSE IN THE REICH'S TREATIES ON THE TRANSFER OF POPULATION

By JOSEPH B. SCHECHTMANN

I

September 28, 1939, marked the conclusion of the Soviet-German agreement on the delimitation, in line with "mutual state interests," of the conquered Polish territories. Eight days later, in the course of a lengthy speech to the Reichstag, Hitler stated:

> "The aims and tasks which emerge from the collapse of the Polish State are, in so far as the German sphere of interest is concerned, roughly as follows:
>
> 1. Demarcation of the boundary of the Reich, which will do justice to historical, enthnographic, and economic facts.
> 2. Pacification of the whole territory by restoring a tolerable measure of peace and order.
> 3. Absolute guaranties of security not only as far as Reich territory is concerned but for the entire sphere of interest.
> 4. Reëstablishment and reorganization of economic life and of trade and transport, involving development of culture and civilization.
> 5. As to the most important task, however, to establish a new order of ethnographical conditions, that is to say, resettlement of nationalities in such a manner that the process ultimately results in obtaining better dividing lines than is the case at present. In this sense, however, it is not a case of the problem being restricted to this particular sphere, but of a task with far wider implications, for the East and South of Europe is to a large extent filled with splinters of the German nationality whose existence they cannot maintain.
>
> In their very existence lies a reason and cause for continual international disturbances. In this age of the principle of nationalities and of racial ideals it is utopian to believe that members of a highly developed people can be assimilated without trouble.
>
> It is therefore essential for a far-sighted ordering of the life of Europe that a resettlement should be undertaken here so as to remove at least part of the material for European conflict.
>
> Germany and the Union of Soviet Republics have come to an agreement to support each other in this matter." [1]

Hitler, having announced a "far-sighted ordering" of the "splinters of the German nationality" in Eastern and Southern Europe, wasted little time. On October 15, 1939, the Reich concluded an agreement with Estonia concerning the transfer of German minorities, and a series of treaties with other countries followed, as indicated in the table below:

[1] Hitler's speech of Oct. 6, 1939, quoted from the authorized English translation published by *Facts in Review*, No. 10, Oct. 14, 1939, German Library of Information.

TREATIES ON THE EVACUATION OF GERMAN MINORITIES CONCLUDED BY THE REICH

Treaty with the Government of	*Date*	*Concerning the German Minority in*	*Number of Persons Involved*
Estonia	October 15, 1939	Estonia	12,900 (a)
Latvia	October 30, 1939	Latvia	48,600 (a)
Italy	October 21, 1939	Southern Tyrol	185,365 (b)
Soviet Union	November 3, 1939	Former Polish Eastern areas: Volhynia, East Galicia, Narev area	128,007 (a)
Soviet Union	September 5, 1940	Bessarabia, North Bukovina	135,959 (c)
Roumania	October 22, 1940	South Bukovina, North Dobrudja	66,100 (d)
Soviet Union	January 10, 1941	Lithuania and (additional) Latvia and Estonia	67,805 (d)
Italy	Fall 1941	Former Yugoslav province of Ljubliana	14,810 (e)
Croatia	October 6, 1942	Former Yugoslav province of Bosnia	18,202 (e)

(a) *Wirtschaft und Statistik*, I. January-Heft, 1941.

(b) Bulletin of International News, Royal Institute of International Affairs, April 6, 1940; 185,365 persons of the total of 266,965 Southern Tyrolese Germans eligible for transfer voted, on December 31, 1939, for resettlement in the Reich. In fact not more than 50,000 were resettled by September, 1940 (*Deutsche Arbeit*, September, 1940) and by the Spring of 1942 not more than 72,000 (*Deutsche Post aus dem Osten*, June, 1942) had been transferred. It can scarcely be assumed that more than 85,000 have been transferred to date, although the German-Italian Treaty of October 21, 1939, stated that the Germans who had opted for transfer to the Reich were to leave the Tyrol by December 31, 1942. On August 21, 1942, the German and Italian Governments had agreed "for special reasons due to the war" to postpone the deadline date for resettlement until December 31, 1943 (*Transocean*, August 21, 1942). Nevertheless, all available data indicate that the resettlement was not terminated as of that date.

(c) *Wirtschaft und Statistik*, No. 7, July, 1941.

(d) *Frankfurter Zeitung*, April 3, 1942.

(e) *Relazioni Internazionale*, October 31, 1942; *Die Deutsche Volkswirtschaft*, 1943, p. 344.

The Reich's two treaties with Italy, as well as the agreements with Roumania and Croatia, will not be discussed in this study. The texts of these four treaties have never been made public by either of the contracting parties (this is also true of the treaties with the Soviet Union), nor is there any accurate comprehensive information as to their contents available. Only the general political development which led to the conclusion of these treaties, the date of their signature, and not always that, the number of potential optants (and not always even that), and the number of persons actually evacuated in accordance with these treaties, is known.

The Reich's five other transfer agreements, concluded in the period

between October, 1939 and January, 1941, despite their varied geographical as well as social-political backgrounds, were bound to each other by the common impulse from which they sprang. They can best be understood and explained in the light of the German-Soviet pacts of August 23 and September 28, 1939, and the ensuing Soviet-German 22-months long experiment of coöperation. The most characteristic feature of these five transfer agreements was the peculiar option clause which they contained.

II

The Reich's first transfer agreement, that of October 15, 1939, with Estonia was entitled: *Protocol on the Resettlement of the German Folk-group in the German Reich.*[2] A fortnight later, on October 30, after three weeks of painful negotiations, a *Treaty on the Resettlement of Latvian Citizens of German Nationality in the German Reich* was signed in Riga.[3] Of all the German transfer agreements, these two treaties are the only ones to have been published in full, thus permitting a thorough study of their provisions.

In so far as their form is concerned, the agreements with Estonia and Latvia are typical treaties of option for the benefit of the citizens of German ethnic nationality of these two Baltic states. Under the provisions of these treaties, the migration of the German folk-groups of Estonia and Latvia was —legally speaking—not compulsory for all members of these German minorities. Each *Volksdeutscher* in Latvia and Estonia was granted the right of option, and it was up to him, and him alone, whether he chose to remain where he was or to leave for the German fatherland. He had simply been informed that the Fuehrer of the German Reich had invited him to settle in the Reich and that the government of his country of residence was willing, on certain conditions, to permit his departure. Nor was the *Volksdeutscher* in any way obliged to exercise the right of option which had been granted him. He was not faced with the dilemma of opting for or against evacuation. He could simply refrain from voting, and his silence would be interpreted as a decision to abide by his present civil status. Were he, however, to exercise his right of option, there was but one choice open to him, that is to opt in favor of the Reich.

Thus, in principle, the German-Estonian and Latvian-German agreements did not provide for an obligatory evacuation of the entire German minority in the Baltic States, but only for the departure of all those Germans who had of their own volition opted for transfer to the Reich. It is true that strong moral and psychological pressure was exercised on the German groups affected which as a matter of fact left the great majority of the optants with but a doubtful freedom of choice. Nevertheless, to speak of a

[2] The full official text of the treaty, both in the Estonian and German languages, appears in the Estonian Official Gazette *Riigi Teataja*, 1939, Part II, pp. 341–346.

[3] The full official text of the Treaty was published, in Lettish and German, in the Latvian Official Gazette *Valdibas Vestnesis*, Oct. 30, 1939, No. 247, pp. 4–7.

forced evacuation of the German Baltic minorities would be inaccurate and unjustified. Both from the legal point of view and in practice these minorities were given the right as well as the possibility to choose freely. The best proof of this lies in the fact that a large percentage of Baltic Germans did not respond to the call of the Fuehrer, preferring to remain in the Baltic countries, their homeland for generations. Of the 78,500 Germans in Estonia and Latvia, 16,244 (21 per cent) chose to remain behind. It was not until 1941, when the Soviet-German treaty of January 10 came into effect, that the latter agreed to be transferred.[4]

The German-Estonian "Protocol" clearly defined persons eligible for "release" from Estonian citizenship under the terms of the agreement with the Reich (Art. I, 1a-c). All persons listed in the national register (*cadastre*) of the cultural autonomy of the German minority were included in this category (Art. I, 1a).[5] The *cadastre* was an absolute criterion, and no objections could be raised where it was concerned. Persons not on the German national *cadastre* could be recognized as Germans by the Estonian Ministry of Interior, which had been authorized to grant certificates of German ethnic nationality to those it deemed eligible (Art. I, 1b). No rules were set to guide the Ministry in issuing or refusing certificates of German nationality. The fact that such a subjective and individual matter as the nationality of potential optants was entrusted to the Estonian Ministry of Interior rather than to one of the governing bodies of the German cultural autonomy, or to the Legation of the Reich in Estonia, is somewhat surprising. It is especially so because Article 20 of the Estonian Constitution of 1920 states specifically that "every citizen is free to determine his own (ethnic) nationality." The group affected by this clause was by no means a small one. According to the 1934 census, there were 16,346 Germans in Estonia. The German national *cadastre* in 1936 listed only 13,343 members.[6] The Estonian Ministry of Interior thus became the sole judge of the status of 3,001 persons, since the "Protocol" had made no provisions for appeal. In the German-Latvian treaty, concluded a few weeks later, it was, as we shall see, the Legation of the Reich in Riga that was designated as the judge of the status of persons of Latvian citizenship claiming German nationality. The wives, children, and parents of the persons mentioned in Art. I, 1a and in Art. I, 1b, had *ipso facto* the right to opt and, eventually, to depart from the country of their residence.

The German-Estonian "Protocol," far less detailed than the later treaty concluded between the Reich and Latvia, did not in so many words state,

[4] Annual Report of the German Resettlement Society (*Deutsche Umsiedlungs-Treuhand Gesellschaft* (DUT) for 1941). *Frankfurter Zeitung*, April 3, 1942.

[5] *Die Nationalitaeten in den Staaten Europas.* Herausgegeben im Auftrage des Europaeischen Nationalitaeten-Kongresses, Wien, 1931, p. 8.

[6] Giere, W., *Bestandsaufnahme des Estlaendischen Deutschtums* in *Deutsche Arbeit*, 1937, Heft I, p. 17.

as did the German-Latvian treaty, that only those persons might be "released" from Estonian citizenship who had freely expressed their decision to abandon forever their actual citizenship and to leave their present residence. However, this condition was implicit in the German-Estonian treaty. Persons over 18 years of age were to submit their applications for "release" personally. Parents or tutors were to decide for those under 18 years of age. If but one of the parents had opted for departure, the children could accompany him (or her) only in case the remaining parent was in agreement (Art. I, 1c). Tutors or superintendents of institutions were to opt for the feeble-minded and the insane. Those in active military service were permitted to present their applications to the military authorities (Art. I, 4). Inmates of penitentiaries were to send their applications to the Ministry of the Interior (Art. I, 5).

All these individual applications were incorporated in one single collective application (Art. I, 2). Immediately following the request to depart from Estonia, the applicant was deprived of his Estonian identity papers and of his passport for foreign travel. In place of these, he was given a special certificate bearing the seal of the Ministry of Interior and valid only for departure from Estonia on one of the German resettlement ships (Art. I, 6). The Legation of the Reich in Estonia indicated on the collective application that persons included would be accepted as citizens of the Reich (Art. I, 7). Included were also those Germans who were being supported by the State, by municipalities, by private persons, as well as Germans in hospitals, or in prisons (Art. I, 8). Persons already in possession of departure certificates could not change their minds (Art. I, 6). Although, unlike the German-Latvian treaty, the Protocol did not set the departure deadline, it was clear that immediate evacuation was expected. In exceptional cases a three-months delay was granted for the settlement of enterprises and business affairs (Art. I, 8).

According to the German-Latvian treaty, only Latvian citizens of German nationality qualified for "release" from Latvian citizenship. The question of defining the German (ethnic) nationality was therefore of primary importance. In Latvia, unlike the situation in Estonia, the institution of national registers (*cadastres*), so useful for the Estonian Germans desiring to prove *Volkszugehoerigkeit* (ethnic nationality), did not exist. Thus in Latvia each individual German was himself responsible for the proof of his German nationality. An additional Protocol annexed to the treaty stipulated that Latvian government bodies would consider as sufficient proof of German ethnic nationality a "recognized certificate" (*eine anerkannte Urkunde*), or, in the absence of, or in case of the inadequacy of, the former document, "a permit for resettlement delivered by the German Legation" (Art. I, a, b). "The permit for resettlement delivered by the German Legation" was first mentioned in the treaty (Par. a) with the note (Par. b) that "another recognized certificate" could also be ad-

mitted as proof. Logically, it would seem that the absence of a permit for resettlement in the Reich obtained from the German Legation would preclude any possibility of opting for transfer. However, since the Protocol offered, as an alternative for the establishment of proof of German nationality, any document considered valid by the Latvian authorities it must be assumed that persons in possession of necessary documents were entitled to apply directly to Latvian authorities, without recourse to the German Legation. If the Latvian authorities recognized the documents as valid, the German Legation simply fell out of the picture. Only in cases where the Latvian authorities refused to recognize the validity of the documents produced by the applicant did the latter have to apply directly to the German Legation.

As far as can be judged from the text of the Protocol, the permit of the German Legation was deemed an incontestable proof of German ethnic nationality. All other documents could be accepted or refused at the discretion of the Latvian authorities. In exceptional cases, however, the Protocol (Art. II) provided that the Latvian authorities were "to prove and to establish" (*glaubhaft machen*) the Lettish nationality of the applicant, should they reject his documents. As a rule, all controversial cases were to be decided by agreement between the Latvian Government and the German Legation. The second section of the same article states that the Latvian Government might not use the Lettish nationality of a husband or a wife as an excuse for refusing to release the family from Latvian citizenship, should one of the parents be of German nationality.

It is noteworthy that according to Art. II of the Protocol, the Latvian authorities could refuse the recognition of their German ethnic nationality only to applicants of Lettish ethnic nationality, or those considered as such by the Latvian authorities. This meant that, if the Latvian authorities judged that an applicant was neither of German nor of Lettish ethnic nationality, they could not (even under the exception foreseen in Art. II) refuse to release him or her from Latvian citizenship. Such, for example, would have been the case of a person of Estonian or Russian ethnic nationality pretending to be of German nationality and in possession of a resettlement permit from the German Legation. The two contracting parties believed, no doubt, that if the applicant were not of Lettish ethnic nationality, the Latvian authorities would not be interested in a careful investigation as to his true ethnic origin. If a non-Lett claimed to be of German nationality, and the German Legation was prepared to recognize him as such and to admit him to the Reich as a resettler, the Latvian authorities would be glad to be rid of him. This attitude of the Latvian authorities explains why a considerable number of Russians, Estonians, Lithuanians, and "stateless" persons were able to leave Latvia together with the German evacuees on the basis of German Legation permits.

Persons over 16 (in Estonia those over 18) had to apply for permits in

person. A husband and wife voted individually and the decision of one was not binding on the other. A legal representative (father, mother, guardian) could decide for children under 16 and for legally incapacitated persons. Parents and guardians could elect a citizenship different from their own for their children and pupils. Thus a legal representative could opt in favor of resettlement on behalf of the persons he represented and remain a Latvian citizen himself; this probably worked inversely as well, and the fact that a legal representative opted for evacuation did not affect the Latvian citizenship of his children or pupils. In contrast to the German-Estonian Protocol (Art. I, 3), the Latvian-German treaty did not contain the clause according to which children under 18 automatically lost the citizenship forfeited by their parents. Men in the armed forces, state and municipal employees, as well as clergy of German ethnic nationality, were on request liberated from their contractual obligations. Finally, all applications for release from Latvian citizenship were considered as final and irrevocable.

The Latvian Government assumed the obligation to release from Latvian ctizenship all those persons whose German nationality had been established and who had applied for said release before December 15, 1939. This obligation had a sweeping character, and although this treaty had not provided for a collective application as had Art. I, 2, of the German-Estonian Protocol, it deprived the Latvian Government of the right to refuse release from Latvian citizenship to all those who had satisfied the conditions laid down in Art. I. On its part the Government of the Reich had assumed the obligation to grant Reich citizenship to all those who, by virtue of the treaty, had lost their Latvian citizenship and had left Latvia for Germany. The Reich's responsibility for an applicant began just as soon as his German nationality was established under the terms of Art. I of the additional Protocol and he had received the certificate of release (*Entlassungsurkunde*), which also served as a permit for departure. From that moment the applicant's Latvian citizenship was considered extinct and the Reich was under obligation to accept him as its citizen. Under no circumstances could the Reich then refuse him its citizenship,[7] even if his German ethnic nationality had been established by the Latvian authorities on grounds of documents other than a "permit" of the German Legation.

All persons who had been released from Latvian citizenship and had received German citizenship were required to leave Latvia before December 15, 1939. In this connection, the obligations assumed by the two contracting parties, under the terms of the treaty, were entirely different. The Latvian Government merely undertook "not to hinder the resettlers" (an

[7] Such was the legal aspect of the problem. In fact, however, after the evacuation, German repatriates were compelled, upon their arrival in the Reich, to go through a four-hour procedure before being accepted as citizens. According to the Berlin correspondent of the New York Times (Nov. 27, 1939), the evacuees were not infrequently refused German citizenship. "Those rejected must apply through normal channels," the American correspondent reported.

obligation of a purely negative character) and "to help their departure" (a positive obligation of a very general and vague character). The obligations of the Reich were, however, of a quite concrete and practical nature, as follows:

a. To ensure the material possibility of departure;

b. To be responsible for all expenses connected with the departure insofar as they were not to be borne by the resettlers themselves (Art. IV).

The only exception made under the additional Protocol (Art. IV) from the departure deadline of December 15 was made for persons whose presence was indispensable to the management of industrial or commercial enterprises, or for other similar reasons. Each individual deferment required the joint approval of the Latvian Government and the German Legation.

III

Treaties on the right of option have been known to international practice for the past three centuries. Any peculiarity in the agreements concluded by the Reich and the Baltic States lay not so much in the legal nature of these treaties as in the political situation which brought them about.

Hitherto all recorded cases dealing with the granting of the right of option to members of an ethnic or religious group had been connected with territorial changes resulting from cession or the exchange of territories. When a territory had been turned over by one State to another it had appeared natural that all those who could not, or would not, accept this change, be given the right to opt in favor of their home State, and to leave the territory of the State whose citizens they were not willing to become. This right was usually stipulated for them by the State to which they had owed allegiance prior to the cession of the territory in which they lived. The home State naturally regarded itself as the protector of its former citizens.

The agreements concluded by the Reich with Estonia and Latvia in October, 1939 were, however, in no way connected with territorial changes. The Latvian and Estonian citizens of German ethnic nationality could hardly be called former citizens of the Reich. Indeed, by these treaties between Germany and the Baltic States the right of option in favor of the Reich was granted to Estonian and Latvian citizens of German ethnic nationality whose forefathers had lived in these Baltic States for over 700 years. At the time when they were granted the right of option, they had lived for over 20 years within the framework of Estonian and Latvian statehood. Thus no legal ground entitling the Reich to act in the so-called interests of the Baltic Germans existed. There had been no war between the three states, no treaty of peace had been concluded, and their territorial frontiers had remained the same.

These agreements between the Reich and Estonia and Latvia are, therefore, in a category by themselves, differing not only from the treaties of option concluded prior to 1939 but also from all later transfer treaties signed by the

Reich itself and involving the right of option. These treaties have invariably been connected with territorial changes. The three transfer treaties concluded with the Soviet Union (November 3, 1939, September 5, 1940, and January 10, 1941) were a sequel to the partition of Poland, the incorporation into the Soviet Union of former Roumanian Bessarabia and Northern Bukovina, and the incorporation of the Baltic States. The agreement between the Reich and Roumania, which dealt with the evacuation of Germans from Southern Bukovina and Northern Dobrudja, was also connected with the territorial changes which these provinces had undergone: the Northern part of Bukovina was turned over to the Soviet Union, while the Southern part of Dobrudja was annexed by Bulgaria. The treaties with Italy and Croatia dealing with the transfer of Germans from the former Yugoslav provinces of Ljubliana and Bosnia had their origin in the dismemberment of Yugoslavia.

Of all the treaties only the one between the Reich and Italy concerning the Germans of the Southern Tyrol seems to constitute an exception. However, the fact must be taken into account that Italy and not the Reich had taken the initiative in demanding the evacuation. The right of transfer was not granted in the interests of the eventual optants, but for the benefit of the country of their residence, which desired to be rid of them. The option was prompted by a purely negative stimulus, which in this case replaced the usual territorial change. No such stimulus existed in either Estonia or Latvia and the question of the transfer of Estonian and Latvian citizens of German nationality was raised on the initiative of the Reich alone, not by the home states of these *Volksdeutsche.*

The Turkish repatriation policy of 1933–39 was similar to the one which determined the actions of the Reich with regard to the Baltic Germans. The repatriation of the Turkish minorities from Bulgaria, Roumania, and Yugoslavia was also not preceded by any territorial changes. The motives of the Turkish Government coincided *mutatis mutandis* with those officially acknowledged by the Government of the Reich in the preamble of its treaty with Latvia: that is, to group together all persons of German (Turkish) nationality within the borders of the Reich (Turkey).

The basic peculiarity of the German-Latvian treaty is embodied in paragraph "a" of the preamble, which states that the contracting countries agree that "this resettlement be executed as a single move as a result of which the German folk-group will withdraw from the framework of the Latvian state." By this clause, what would ordinarily have been a commonplace case of option, with precedents dating back to the seventeenth century, was turned into a political move unprecedented in history. For hitherto, no matter how large a number of persons, in a given country, and within a stipulated period of time, had chosen to exercise a right of option in favor of another country, the status of those members of the same ethnic group, who had elected to stay in their homeland, remained unaffected.

The Reich, regarding itself as the natural protector of the rights of Germans wherever they might live, openly disregarded this traditional rule. The far-reaching formula agreed upon by the Reich and Latvia, permitting the Reich to carry out the almost immediate total evacuation of Germans residing in Latvia, and to proclaim, on behalf of the German people throughout the world, that there were no more Germans in the Latvian State who might lay claim to any national rights, was in full accordance with the aims and wishes of the two contracting parties. The Reich considered all Germans who did not respond to a call by the Fuehrer as "bad Germans," deserving neither protection nor the privilege of claiming any collective rights as a German minority. At the same time, the elimination of its powerful and ambitious German folk-group as an entity was of tremendous importance for the Latvian Government, greatly simplifying a number of internal political, national, and social-economic problems confronting the young state.

IV

The German-Soviet treaty of September 28, 1939, awarded an area of about 78,500 square miles of territory, with a population of 13,000,000, mainly Ukrainians and White Russians, to the Soviet Union. This area comprised, *inter alia,* the former Polish provinces of Volhynia and Eastern Galicia, as well as the district of the Narev River. These regions contained large German groups, numbering from 90,000 (according to Polish statistics) to 120,000 (according to German sources). In line with its new policy of removing Germans from Soviet spheres of interest, the Reich, on October 17, in Moscow, commenced negotiations "for the return to Germany of German citizens and persons of German origin residing in the Western Ukraine and Western White Russia (the above mentioned Polish territories were incorporated into the Soviet Union under these names), who desire to settle in Germany." On November 3, 1939, a German-Soviet treaty was signed, which stipulated that persons of German ethnic nationality residing in the part of Poland incorporated into the Soviet Union, and persons of the White Russian or Ukrainian nationalities residing in the part of Poland incorporated into the Reich, or in territories forming the German "sphere of influence," were permitted to opt for German or Soviet citizenship respectively and, accordingly, to leave the territory of their actual residence. Thus, the treaty provided for an exchange of populations.

The text of the treaty has never been made public by either of the contracting parties. However, a detailed communiqué bearing the dateline of Moscow, November 4,[8] outlined its general character and main provisions. The communiqué placed especial emphasis on the voluntary character of the prospective resettlement. The two contracting parties agreed that "a free expression of will by each individual is to be the decisive factor for evacuation. There shall be neither direct nor indirect pressure." As far as can be

[8] Published in the *Frankfurter Zeitung,* Nov. 5, 1939.

judged from both German and Soviet sources—all being subject to strict censorship—no pressure was exercised to influence the optants.

Repatriation on an "optional basis" is no innovation in the international treaty practice of the Soviet Union. T. A. Taracouzio, in a well-documented study on the Soviet Union and international law, published in 1935, emphasized that "in Soviet practice the principle of the right of option finds application not only to the inhabitants of States newly formed from the old Russian Empire, but to those of annexed territories as well."[9] Stipulations of the right of option in favor of one of the two contracting parties may be found in the Soviet Union's Treaty of Peace with Estonia of February 2, 1920, in the Treaty of Peace with Latvia of August 11, 1920, in the Treaty of Peace with Lithuania of July 12, 1920, and in an Agreement of June 18, 1929 on the procedure of opting for Lithuanian citizenship, in the Treaty with Finland of October 14, 1920, in the Treaty with Turkey of March 16, 1921, and in the Treaty of Peace with Poland of March 18, 1921.[10] Article 4 of the Treaty with Estonia concluded by the RSFSR characteristically provided that:

> "For one year from the date of the ratification of the present Treaty persons of non-Estonian origin residing in Estonia and aged 18 years or over shall have the right to opt for Russian nationality. . . . Similarly, persons of Estonian origin residing in Russia may opt for Estonian nationality during the same period and under the same conditions."

All the above mentioned treaties contained similar clauses.

The German-Soviet Treaty of November 3, 1939, spoke of a "free expression of will by each individual." However, nothing was said as to whether each member of a family was required to choose for himself, or whether minor children and wives were to share the fate of the head of the family. It has been noted that both the German-Estonian and German-Latvian treaties contained detailed provisions for a variety of possible cases of option. There is no reason to believe that the Soviet-German treaty of option provided as carefully for individual cases. As a matter of fact the practice of the preceding Soviet option agreements would indicate the opposite. All the earlier treaties with Estonia, Latvia, Lithuania, Finland, Poland, and Turkey, in so far as they dealt with the right of option, almost invariably contained a paragraph corresponding to the following Art. IV of the Treaty of Peace with Estonia of February 2, 1920:

> "Women and children under 18 years shall follow the nationality of the husband or father, unless there exist between husband and wife any agreement to the contrary."

As a rule, the husband or father opted for his wife and children. The

[9] T.A. Taracouzio, *The Soviet Union and International Law*, p. 97.

[10] League of Nations Treaty Series, Vol. XI, p. 51; Vol. II, p. 212; Vol. III, p. 122; *Izvestia*, No. 238, Oct. 23, 1920; Collection of Enactments and Regulations of the Workers' and Peasants' Government of Dec. 12, 1921; League of Nations Treaty Series, Vol. VI, p.123.

modification of this rule required a special agreement between the husband and wife. It was implied that in the absence of such an agreement the decision of the husband or father was valid even against the desire of the wife. [11] This was a traditional rule in the international practice of option and, although it seems too patriarchal for the communist legal concept, it was apparently accepted as a basis for the treaty with Germany. The *Volksdeutsche* involved here were a radically different group from the Baltic Germans. Mixed marriages between Germans, Estonians, Letts, and Russians, also Jews—although to a much lesser degree, were not infrequent in the Baltic States and many a family faced the tragic possibility of separation. Under these circumstances, the procedure of option had to be individualized. On the other hand, mixed marriages were very infrequent among Volhynian and Galician Germans. There was no reason to expect disagreements between husbands and wives on grounds of nationality. A strict patriarchal way of living predominated in the peasant families and the will of the head of the family was as sacred as law in all questions.

There is no indication as to the standards used to decide whether a person was entitled to opt either for German or for Soviet citizenship. In the first case, this right was granted to "persons of German (ethnic) nationality," in the second case it was granted to "Ukrainians, White Russians, and Russians." Since there was no national registration in Poland, there could be no unquestionable proof of membership in a given national group. The communiqué made no mention of any authority, either German or Soviet, which had power to certify the ethnic nationality of the persons involved, or concerning the actual procedure of option. It is believed that the so-called *Umsiedlungskommando* (Resettlement Staff) created by both sides had the deciding word in this procedure. If, for instance, a *Volksdeutscher* was included in the lists of a representative of the German Resettlement Staff as "a person of German nationality," it was taken for granted that:

(a) The person in question was of German ethnic nationality;
(b) He or she had opted for German citizenship;
(c) He or she had forfeited his (or her) claim on Soviet citizenship;
(d) The Reich had agreed to grant him (or her) German citizenship;
(e) He (or she) might leave Soviet territory.

It was unavoidable that disagreements should arise between the Reich representatives and those of the Soviet Government, and these differences bore chiefly upon the question of nationality, and on the right to opt and to depart of certain persons or groups of persons. The communiqué of November 3 did not mention how these differences were to be settled. The Soviet representatives were apparently instructed to place as few obstacles as possible in the path of those desirous of departing. The procedure used by the Soviet Government here was probably the same as that provided by a number of agreements concluded with Western European powers con-

[11] Taracouzio, p. 98.

cerning the repatriation of their nationals, [12] as well as by corresponding agreements with the Baltic States and Poland dealing with the repatriation of refugees and prisoners. [13] This procedure was similar to option only in that it was based on the free decision of those to be repatriated. But, as Mr. Taracouzio has emphasized with regard to this category of optants, "the procedure was simplified to the utmost."

"These treaties prove that the Soviet authorities realize the difference between the principle of option and that of repatriation. While the former is a legal method of acquiring citizenship, repatriation is a practical method of restoring persons to the jurisdiction of the state to which they owe allegiance." [14]

The Soviet Government obviously looked upon the German settlers in the newly-acquired former Polish regions as persons "who owed allegiance" to the Reich and were therefore only being "restored" to German jurisdiction. The Soviet did not regard them as newly-acquired Soviet citizens who had opted for another state. If this had been the case, a thorough investigation of their rights of option would have been necessary. They were, on the contrary, in this instance treated as an alien element whose repatriation was a matter of course and whose departure was welcome. If among these Germans some preferred residence in the Soviet Union to being repatriated the possibility should be left open to them as an exception rather than as a rule.

The optional basis of the treaty of November 3, 1939, is one of its most essential features. But, if one seeks an analogy for this treaty in the historic development of the option clause, it will be found only in the ancient and primitive patterns of option, which in fact merely stood for freedom of emigration. The oldest instance of this kind is found in the treaty of capitulation of the city of Arras in 1640. The treaty of Breda, concluded on July 21/31, 1667, between Louis XIV and Anne of England, and all the subsequent treaties of option of the seventeenth, eighteenth, and early nineteenth centuries, fall into this same category. In all these treaties the populations of regions which had changed allegiance were granted the right to emigrate. The so-called "option" was only the alternative, in legal form, given to each inhabitant of a region which had changed sovereignty, either to accept a new allegiance and all that went with it, or to emigrate. In the latter case the option clause simply insured the right of unhindered departure and gave certain guaranties with regard to property interests connected with this de-

[12] Treaties concluded by the RSFSR with Great Britain of Feb. 12, 1920; with France of April 20, 1920; with Italy of April 27, 1920; with Belgium of April 20, 1920, and with Denmark of Dec. 18, 1919.

[13] Treaties concluded by the RSFSR relative to refugees: with Lithuania of June 13, 1920 and of June 30, 1920; with Latvia of Nov. 16, 1920; with Estonia of Aug. 19, 1920; with Finland of Aug. 12, 1922; see also the Agreement of Repatriation between the USSR and the Ukrainian SSR and Poland of Oct. 12, 1920.

[14] Taracouzio, p. 113.

parture. In order that such emigration could take place it was essential that the new country of allegiance be prepared to recognize the optant as its citizen and admit him to its territory. The juridical proceedings of option thus played a subsidiary rôle, having the simple aim of enabling given persons to emigrate and of giving this emigration a legal form. The option clause found in Article XIV of the Treaty of Utrecht (1713) protecting the French Catholic minority in Newfoundland and Nova Scotia is a classic example of its type.[15] It stated:

> "It is expressly provided that in all the said places and colonies to be yielded and restored by the most Christian King, the Subjects of the said King may have Liberty to remove themselves within a Year to any other Place as they shall think fit, together with all their movable Effects."

The first indications of a transition towards new forms of option appeared in the Russian-Austrian Treaty of April 21/May 3, 1815, concluded in Vienna. Here the center of gravity lay in the citizenship and in the (ethnic) nationality of the optant, rather than in emigration.[16] As a matter of fact the Soviet-German transfer treaties of this century lapse back to the original, primitive patterns of the option clause.

The peculiarity of the Soviet-German treaty of November 3, 1939, lies, therefore, in the peculiar and unprecedented form of the option, rather than in the optional basis as such. As has already been stressed in previous cases of option, the latter took place whenever a territory was transferred from State A to State B. The citizens of State A residing in the ceded territory had the right to opt in favor of the home state and to settle there. A similar right might eventually be granted to citizens of State B who happened to reside in State A. Thus only two factors were involved: States A and B.

The situation is much more involved in the case under discussion. State A (Poland), the former sovereign of the territories subject to the treaty of November 3, 1939, ceased to exist from the point of view of the heirs to these territories: State B (Soviet Union) and State C (the Reich). States B and C, therefore, concluded a treaty based on the principle of optional exchange of populations. As a result, instead of the normal A-B combination, we have a triangle, A-B-C, with B and C emerging as the only active factors.

Moreover, still another peculiarity should not be lost sight of. According to the treaty of November 3, not all former Polish citizens of the territories acquired by the Soviet Union were given the right to opt in favor of the Reich. This right was accorded only to former Polish citizens of German ethnic nationality. And, inversely, only former Polish citizens of Ukrainian, White Russian, or Russian nationality, who resided in the regions incor-

[15] Utrecht Treaty of Peace and Friendship, March 21 / April 11, 1713. B.H.M. Special Command. London. Printed by John Basket, Printer to the Queen's Most Excellent Majesty, 1713, p. 74.

[16] Kunz, Joseph L. *Die Voelkerrechtliche Option*, Breslau 1935, Band I, pp. 33–37.

porated into the Reich, or which were under its domination (General Government), were given the right to opt in favor of the Soviet Union. In a sense this is an acceptance of the National Socialist conception of the "protective right (*Schutzrecht*) of the mother state" over its folk-groups scattered throughout the various countries of the world. Baron von Freytag-Loringhoven, Member of the Reichstag, stresses that this "protective right of the mother-state" is to be considered "as the legal basis for the resettlement treaties, which Germany first concluded."[17] According to this conception, all *Volksdeutsche* in the entire world, whatever their citizenship, are regarded as: (a) if not always former; (b) then to a certain extent present; and (c) possible future citizens of the Reich. The treaty of November 3 is in fact based on the concept of an ideal super-state "racial citizenship," rather than on the traditional "state-citizenship." The treaty seems to recognize implicitly that whenever the status of a territory undergoes modification persons of German origin residing in said territory may opt in favor of the Reich as the only alternative to acceptance of the new sovereignty.

It is not to be inferred that the Government of the Soviet Union, in concluding the treaty with the Reich, deliberately accepted this viewpoint and in so doing made it the cornerstone of a new international legal concept. Far from it. This conception is in organic contradiction not only to the ideology of the Soviets but also to their practice in the past. However, the treaties governing the evacuation of the Germans from territories which had passed into the sphere of influence, or under the sovereignty, of the Soviet Union, like all other succeeding treaties with the Reich (down to June 21, 1941), were exclusively dictated by considerations of expediency. In concluding them, the Soviet Government had obviously not taken into account the principle which they represented, nor how the acceptance of such terms might be interpreted. Its interest at the time was to rid the newly acquired territories of embarrassing German minorities which could become a source of very undesirable conflict with the Reich. It was also in the interest of the Reich that these minorities be repatriated. A treaty to this effect was the natural outcome.

However, this cannot change the unusual juridical construction of these treaties, nor can the peculiar political and legal consequences to which they have given rise be brushed aside. The treaty of November 3, which is based on a principle of reciprocity, automatically applied the principle of the ideal "racial citizenship" also to those Ukrainians and White Russians who resided in the former Polish territories annexed by the Reich. This principle was thus imposed on the Soviet Union. In a radio address of September 17, 1939, Soviet Foreign Commissar Molotov emphatically declared:

> "It is impossible to expect from the Soviet Government a disinterestedness in the fate of consanguineous Ukrainians and White Russians."

[17] Baron von Freytag-Loringhoven, "Politics and Right" in *Europaeische Revue*, Jan., 1941. *Voelkerrechtliche Neubildungen im Kriege*, Hamburg, 1942.

Nine months later we come across the same terminology with regard to Bessarabia and Bukovina, which were at that time incorporated into the Soviet Union under the slogan of rescuing "consanguineous" populations. *Izvestia* of June 30, 1940, declared:

> "In Bessarabia we found our consanguineous brethren in a state of despair."

Here we have the Soviet variation of the German theory of the "protective right of the mother-state."

V

On June 26, 1940, the Soviet Government handed Roumania an ultimatum demanding the cession of all of Bessarabia and the Northern part of Bukovina to the USSR. The Roumanian Government was forced to accede to this demand, and an area of 18,888 square miles with a population of 3,700,000 was incorporated into the Soviet Union. This territory contained about 130,000 Germans. On July 25, negotiations began for the evacuation of this German minority, and a treaty concerning the resettlement of Germans from Soviet Bessarabia and Northern Bukovina was concluded on September 5. As usual, the text of this treaty has never been published. On its conclusion both sides issued brief press releases, stating the fact of signature, and nothing more. There is no official data or even any intimations as to the underlying principles of this agreement. It is probable however, that these principles are generally analogous to those upon which the agreement of November 3 is based.

If this assumption is correct, then the evacuation from Bessarabia and Northern Bukovina was in principle a voluntary one, having an optional basis. In this case the application of the optional principle, however, was even more peculiar than with respect to the Baltic States and the Eastern provinces of dismembered Poland. The triangle combination, with Poland (State A), Soviet Russia (State B) and the Reich (State C) as the participants, here took another and quite paradoxical turn. Roumania (State A) was compelled to cede to the Soviet Union (State B) the territories of Bessarabia and Northern Bukovina. It would seem that a classical opportunity for the option provision was thus created. But the option provision was not included in the agreement signed between A (Roumania) and B (Soviet Union) concerning the cession of these territories, and as a rule former Roumanian citizens of these territories did not receive the right to opt in favor of Roumanian citizenship, with all the consequences deriving therefrom. Only a small fraction of the Roumanian citizens of these territories, those of German origin, received the right to opt. Even this was not the result of an agreement between the only two logical partners, A (Roumania) and B (Soviet Union), but of an agreement between B (Soviet Union) and a third State, C (Germany), which appeared on the scene as a *deus ex machina*.

State A (Roumania) was completely ignored in this agreement. It did not take part in the treaty in any way, nor was it even a beneficiary of the option.

The German-Soviet agreement of September 5 provided only one alternative. Former Roumanian citizens of German origin living in the territories of Bessarabia and Northern Bukovina could either refrain from voting, in which case they remained (or became) citizens of the Soviet Union; or they could opt for the Reich, in which case they were to be transferred to Germany. Another quite obvious possibility was overlooked entirely. This was that former Roumanian citizens might desire to keep their Roumanian citizenship and opt for repatriation to Roumania. All international practice points to the inclusion of this as the most natural alternative. Roumania did not cease to exist as a state. Neither Germany nor the Soviet Union had declared this country "liquidated," as they had Poland. The inhabitants of the former Polish Eastern regions could not have been given the right to opt for their Polish citizenship, because, from the point of view of both contracting countries, Poland had ceased to exist as a sovereign state. But both the Reich and the Soviet Union continued to recognize Roumania as an independent state, possessing all the rights normally belonging to such a state. To deprive her former citizens of the right to opt for their Roumanian citizenship was an innovation in international practice.

It is possible that the Roumanian Government (if not *expressis verbis*, then *tacitu consensu*) showed little interest in this question. If this was so, the alternative of opting in favor of Roumania could in any case not have been advanced, as the premise of every option in favor of a definite state is the willingness of said state to accept as citizens those who opt in its favor. On the other hand, this would in no way justify an agreement with the Reich for option in favor of German citizenship. Neither Bessarabia nor Northern Bukovina had ever been under German sovereignty. The Germans living in these territories had not been citizens of Germany for at least four generations. No territorial or legal criteria whatsoever existed which might entitle the Reich to demand that Bessarabian and Bukovinian Germans be granted the right to opt in its favor.

VI

In June, 1940, after a transition period of military occupation under the terms of the Soviet "mutual assistance" pacts with Estonia (October 4, 1939), Latvia (October 5, 1939) and Lithuania (same date), these three Baltic States were completely sovietized, and early in August of the same year were incorporated into the Soviet Union. Seven weeks after incorporation, in Moscow, the Reich began negotiations for the transfer of the German minority in Lithuania and the complementary evacuation of the Germans who had remained in Estonia and Latvia after the transfer operation of November–December, 1939. On January 10, 1941, an agreement was reached,[18] which, like all the preceding German-Soviet agreements of this

[18] *Monatsschrift für Auswaertige Politik*, Nov., 1940.

kind, remained unpublished. *Tass* and *DNB*, official news agencies, contented themselves with brief and uncommunicative statements.

In its legal form the agreement of January 10, 1941 conforms rather closely to its predecessors. The Soviet Union, which absorbed the three Baltic States, may be looked upon as a natural contracting party, the full-fledged legal successor to their sovereignty.[19] But the Reich as the second contracting party had, in this case, just as in all the previous transfer treaties, no proper basis for its demands. Again the Germans living in these countries had not been German citizens for many generations and the countries themselves had never previously been under German sovereignty. However, Germany's so-called "protective rights of a mother country" had already been firmly established by a series of precedents. Each time that a territory had been turned over to the Soviet Union it was considered self-evident that persons of German (ethnic) nationality be given the right to opt for German citizenship and transfer to the Reich.

Like all the previous transfer treaties, the agreement of January 10, 1941, was based on the right of option. The joint German-Soviet communiqué stated:

> "German citizens and persons of German (ethnic) nationality residing in the Latvian, Estonian, and Lithuanian Soviet Socialist Republics, who expressed the desire to resettle (in the Reich), declare their desire in the course of two and one half months after the conclusion of the agreement in the manner provided for by that agreement." [20]

The communiqué gave no details as to the "manner provided for" by the agreement. It may be assumed that the usual option procedure was accepted as a basis for the resettlement. How the eligibility of persons for the right of option was decided, is not known. Indications are that the definition of this category was very broad. A Lithuanian source [21] stated that "persons able to prove their German descent, relationship, graduation from schools in Germany, or possession of property there" were considered as "persons of German nationality." This extremely wide and elastic definition would give many anti-Soviet minded Lithuanians the opportunity to declare themselves Germans, opt for resettlement in the Reich, and thus to leave Lithuania legally. Similar situations had arisen in the course of the earlier evacuations from Estonia and Latvia (November–December, 1939), from the Soviet-incorporated Eastern Polish provinces (December, 1939–February, 1940), and from Bessarabia and Northern Bukovina (October–November, 1940), when numerous Letts, Estonians, Russians, Ukrainians, and others, fearing sovietization, took advantage of the transfer agreements and opted for resettlement in the Reich. In all of these cases there seems to

[19] The legality of the proceedings by which the Soviet Government annexed Latvia, Estonia, and Lithuania is not considered here.

[20] *Mirovoye Khosyaistvo i Mirovaya Politika*, 1941, p. 128.

[21] *Current News on the Lithuanian Situation*, published by the Lithuanian Legation in Washington (No. 7, Oct. 15, 1941).

have been a repetition, *mutatis mutandis*, of the phenomenon described in an article on "Option" published some eighteen years ago in the Soviet *Encyclopedia of State and Law*. Dealing with the right of option provisions of the peace treaties concluded with Poland, Lithuania, Latvia, and Estonia in 1920, the Soviet author wrote:

> "In view of the particular historic conditions, the procedure of option was a means, not only of national, but also in a large measure of class self-determination; persons belonging to the bourgeoisie, whatever their national origin, longed above all to leave the boundaries of the Soviet Republic." [22]

The Lithuanian source already quoted asserted that less than one half of the 50,000 who had opted for resettlement in the Reich belonged to the German (ethnic) nationality. From a German report of October, 1943 [23] it appears that the number of non-Germans among the 50,471 persons who had opted for repatriation to the Reich was between 10,000 and 11,000. Nothing is known concerning the percentage of non-Germans among the some 17,000 repatriates from Latvia and Estonia who had been evacuated on the basis of the same agreement.

It must be noted that, in the case of Lithuania, the transfer was not a unilateral evacuation of Germans, as it had been in Estonia and Latvia, but was analogous to the agreement of November 3, 1939, which provided for an exchange of population. Parallel to the transfer of persons of German (ethnic) nationality from Lithuania, the contracting parties also agreed on the transfer to the Soviet Union of "Lithuanian citizens, and persons of Lithuanian, Russian, or White Russian nationality," from the former Memel region (occupied and annexed by the Reich on March 23, 1939, five months before the outbreak of war) and from the former Polish region of Suwalki (occupied by Soviet troops on September 25, 1939,[24] and ceded to the Reich in November of the same year).[25] In both of these regions there had remained Lithuanians, Russians, and White Russians for whom the Soviet Government wished to reserve the right to opt for the USSR. It, therefore, took advantage of the Reich's offer concerning the transfer of the German minority from Lithuania so as to be able to settle the matter on a reciprocal basis. Actually, however, not more than 21,343 persons opted for resettlement in the Soviet Union, less than one half of the number (50,471) repatriated to the Reich from Lithuania. Nevertheless, despite the obvious numerical disproportion, this Soviet-German treaty is in its very nature an agreement for an exchange of population, rather than a unilateral treaty of evacuation.

[22] *Encyklopediya Gosudarstva i Prava.* Moscow, 1925–1927, Vol. III, pp. 135–136.

[23] "*Die Deutsche Volkswirtschaft,*" No. 10, p. 344.

[24] The New York Times, Sept. 27, 1939; *Pravda*, Sept. 26, 1939.

[25] O. D. Tolischus, "They Wanted War," p. 310. Oskar Halecki, "Poland's Eastern Frontiers," in *Journal of Central European Affairs*, Oct., 1939, p. 338.

JURISDICTION OVER MEMBERS OF ALLIED FORCES IN EGYPT

By Jasper Y. Brinton

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By her Treaty of Perpetual Alliance with Great Britain, signed in 1936, Egypt undertook to give to her Ally, in time of war and within the borders of her own territory, every facility and aid in her power. These obligations she has respected in letter and in spirit. As a result she finds herself today, while still a neutral, acting as host to large armies drawn from all the quarters of the globe. These troops are within her borders on her express or tacit invitation. To them—as allies and as allies of her ally—is extended the traditional hospitality of the land. At the same time their presence raises numerous problems. One of these is that of criminal jurisdiction. Egypt has only recently emerged victorious from a long struggle to free herself from restraints on her national sovereignty in judicial as well as in other fields. The lively consciousness of that struggle, the familiarity of her ruling classes with all the legal aspects of the problem, and the fact that these foreign troops include many men who had long been resident in the country, give assurance that this question would attract an unusual measure of public interest. For two years it has engaged the attention of lawyer and diplomat. It has been the subject of successful diplomatic negotiations and of a series of legal decisions that form an important chapter in the judicial annals of the country. Practically all phases of the problem have now been explored, and its special difficulties cleared up. As it is a problem of very general importance a summary of the situation as it presents itself today may be of interest.

THE BRITISH TREATY

As respects the British forces, the situation was happily taken care of before the outbreak of war.

By Article 9 of the Treaty of London, signed on August 26, 1936, it was declared that the "immunities and privileges" to be enjoyed by the British Forces in Egypt, in matters of a fiscal nature and in those involving questions of jurisdiction, should be fixed by a special convention. By the Convention signed on the same day (Art. 4) it was provided that "no member of the British Forces" should be subject "to the criminal jurisdiction of the Courts of Egypt, nor to the civil jurisdiction of those Courts in matters arising out of his official duties."

By the same Treaty (Art. 1) the expression "British Forces" was declared to include three classes of persons, *viz.:* a) Soldiers, Sailors and Airmen; b) "every civilian official of British nationality accompanying or serving with the said forces, who is either granted relative status as an

officer, or holds a pass designating his status, and who is paid" out of the British public funds; c) "wives, and children under 21 years of age, of the persons mentioned" in the preceding paragraphs. By a special article the privileges thus conferred apply only to persons "stationed with or attached to those forces of His Majesty who are present in Egypt in accordance with the provisions of the Treaty of Alliance."

This specially reserved jurisdiction is exercised by two categories of British Courts: First, Courts-Martial, and Second, British Courts specially authorized to exercise such jurisdiction.

As to Courts-Martial, the persons subject to military law are specified in Articles 175 and 176 of the Army Act under the two categories of officers and soldiers, and similar definitions are included in the Air Force and Navy Acts.

Among the twelve paragraphs of Article 175 defining different categories of "officers," is included one covering the case of certain civilians, as follows: "Any person, not otherwise subject to military law, accompanying a force on active service" and holding a pass entitling him to be treated on the footing of an officer. This category would cover persons like contractors or newspaper correspondents.

Among the eleven paragraphs of Article 176 defining the various categories of "soldiers," two cover the case of civilians, viz.:

> "9. All persons who are employed by or are in the service of any of His Majesty's troops when employed on active service," . . .
>
> "10. All persons not otherwise subject to military law who are followers of or accompany His Majesty's troops or any portion thereof, when employed on active service"; . . .

The former class would cover, for instance, the employes of the former Occupied Enemy Territory Administration, now the Office of Civil Affairs, and all other persons directly employed by the Army. The latter would be applicable, *inter alia,* to the case of officer's servants in India, not members of the forces. While these civilians are subject to court-martial jurisdiction, like members of the forces, the Army Act contains certain special provisions as to the particular type of court-martial before which they may be tried, and adds a restriction that such persons "shall not be liable to be punished by a Commanding Officer" (i.e. summary punishment).

The jursidiction thus conferred on courts-martial does not, however, cover the whole field of reserved jurisdiction. It is far from complete on the criminal side and of course does not apply at all in the case of the reserved jurisdiction in the matter of civil claims.

It thus became necessary to establish a suitable judicial forum to cover what was in effect a special ex-territorial jurisdiction. This was done by the creation, by Order in Council of October 2, 1937, of what is styled "His Britannic Majesty's Consular Court for Egypt." Properly speaking this is not a Consular Court at all, as such courts were abolished by the Treaty of Montreux, except as to the exercise of an optional reserved jurisdiction

in cases of personal status. The new court is simply a Royal British Court, established to meet a special situation created by a Treaty, and whose existence is impliedly authorized by that Treaty. Provision is made for the appointment of a judge—"appointed by His Majesty under His Royal sign manual," and who must be a member of the British, Scotch, or North Irish bar, of at least seven years standing. Provision is also made for the appointment, by the Secretary of State, of one or more Assistant Judges, for such period of service as shall seem necessary. In addition, there is provision for a Full Court to act in certain cases as a Court of Appeals and to include, if available, the Assistant Judge and the Chief Justices of Palestine, Cyprus, and the Sudan, or, in their place, a British Judge of the Supreme Court of Palestine, the Puisne Judge of the Supreme Court of Cyprus, and the Legal Secretary of the Sudan Government. An appeal to the Privy Council is provided for in certain cases.

The jurisdiction of this new court extends to three classes of cases, viz.: 1) Matters of personal status; 2) "In criminal matters, to all crimes or offenses committed in Egypt by a member of the British Forces"; and 3) "In civil matters other than matters of personal status, to actions brought against a member of the British Forces in Egypt"—or against a member of the British Military Mission—"where the matter arises out of his official duties," and the British Ambassador, with the consent of the commanding officer of the particular branch of the services involved, "certifies to the Court that he considers it desirable that the action should be tried by the Court":

1) The category of personal status cases requires no special comment. It is substantially the same jurisdiction as has always been exercised by the Consular Courts under the capitulations and which was reserved to all the capitulatory powers under the Treaty of Montreux, for the "transitional period," extending to October 14, 1949, the date fixed for the suppression of the Mixed Courts.

2) As to criminal matters, the jurisdiction of the court is, as stated above, to be exercised only with "the consent of the Appropriate British Authority —obtained and signified in writing to the Court." Such authority is defined, by reference to the Treaty of 1936, as the chief commanding officer of the military, naval, or air forces, as the case may be. The granting to the court of jurisdiction over "all crimes or offenses committed in Egypt by a member of the British Forces," taken in connection with the proviso (Art. 93) that jurisdiction shall be exercised on the principles of, and in conformity with English law for the time being, would seem to exclude offenses created by Egyptian penal legislation.

While the new court exercises jurisdiction in many cases (e.g., matters involving the wives and children of members of the Forces) where court-martial jurisdiction could not be properly exercised, and also has been given jurisdiction over certain specific offenses not covered by the Army Act

(e.g., smuggling, exciting enmity between subjects of the British and Egyptian Governments) it also exercises a concurrent jurisdiction in the case of all crimes covered by court martial jurisdiction with the consent of the "appropriate authority," thus enabling those responsible for the conduct of military prosecutions in the forces to have cases sent over to the new court wherever this seems desirable.

3) As to civil matters, it will be recalled that the Treaty of 1936 reserved cases arising out of "official duties." On this point the Treaty reserves to the British Ambassador the final decision as to whether the proceedings "arise out of official duties or not."

JURISDICTION AS TO OTHER MILITARY FORCES

This question has formed the subject of a considerable diplomatic discussion and several legal decisions. The situation to date may be summarized by reviewing these transactions briefly.

Extended negotiations between the United States Legation and the Egyptian Government resulted, on March 2, 1943, in the signing of an agreement granting the American Forces substantially the same immunity from local penal jurisdiction as that enjoyed by the British Forces, but only for the duration of the war. The "forces" were defined as including all persons subject to the military and naval laws of the United States on Egyptian soil, as well as all civilian personnel of American nationality accompanying the forces or serving with them. As to offenses committed by civilian personnel, however, the Egyptian Government retains the option of asserting the jurisdiction of its courts. Another difference from the British Treaty of 1936 is that the American agreement does not extend to the wives and children of members of the Forces. Nor does it cover civil claims. These may therefore be made the subject of suits in the Mixed Courts. Arrangements are in process, however, for the establishment of a Claims Commission for the hearing of claims for war damage.

Passing to the realm of judicial decision, it may be noted first that the question has formed the subject of some twenty written decisions in the Mixed Courts, three of these having been rendered by the court of last resort, the Court of Cassation, composed of justices of the Court of Appeals.

Under the French procedure followed in the Mixed Courts these cases have called for decisions by a much larger number of judges than would have been the case in England or the United States. The question of jurisdiction is first passed on by the *juge d'instruction* or examining magistrate, a member of the branch of the lower courts specially delegated for this duty. If jurisdiction is retained the case passes, in case of *crime* (as distinguished from misdemeanor), to the *Chambre de Conseil*—in effect a judicial grand jury composed of three judges. If this body is also of opinion that the case falls within the jurisdiction of the Mixed Courts it is sent to the appropriate criminal court—the Misdemeanor Court of three judges or

the Court of Assizes of five. These courts in turn pass on the question of jurisdiction. Finally, since it is a question of law which is involved, the case goes to the Court of Cassation for final decision. In the course of its progress the case will thus have invited the attention of fourteen judges. A majority of these will probably have been foreigners.

The first case to reach the Court of Appeals (*Triandifilou c. Ministère Public*) was that of a Greek seaman, a certain Georges Triandifilou, member of the crew of a Greek warship, charged with carrying concealed weapons and attacking a police agent. The accused had been sent ashore to purchase supplies with instructions to return by midnight. The offense occurred before that hour, outside a local bar. Observing that the Egyptian Government, which had voluntarily opened its territory to the access of Greek Forces, the Court, on the strength of an official correspondence produced, rejected the suggestion that the Egyptian Government had tacitly conceded to members of the Greek Forces the same privileges of immunity as had been given by Treaty to the members of the British Forces. It accordingly applied, by analogy, the rules adopted at Stockholm in 1928 by the Institute of International Law, which, in turn, reproduced substantially the Hague rules of 1898 on the same subject. The rule in question recognizes the jurisdiction of the local sovereign in the case of offenses committed by seamen on its soil, but makes an exception in the case of those who are on active duty (*Si des gens du bord se trouvant à terre en service commandé, soit individuellement, soit collectivement, sont inculpés de délits ou de crimes commis a terre, l'autorité territoriale peut proceder à leur arrestation, mais elle doit les livrer au commandant sur la demande de celui-ci*). As to whether the seaman was at the time of the offense engaged in a *service commandé* the court had held that the question depended not on the intrinsic character of the offender's act or on his own state of mind but on the nature of the orders under which he was serving, a test which placed him within the scope of the exception. He was accordingly remanded to his naval superiors for trial. (The decision or *arret* of the Court of Cassation was handed down on June 29, 1942.)

In the second case (*Stamatopoulos c. Ministère Public*) the accused was a member of the Greek Aviation Forces and was prosecuted for an embezzlement committed before he joined the service. A strong effort, supported by official documents not presented in the previous case, was made to establish the fact of a tacit acquiescence by the Egyptian Government in the claim to immunity.

It was argued that the imposition of any restrictions on the exercise to military jurisdiction by friendly forces must, in order to be effective, have been made at the time of their entry, since the consent given, without previous reservations, to the presence of foreign troops, would imply, under international law, the recognition of a complete immunity from jurisdiction. (Citing the case of the *Exchange*, decided by the U. S. Supreme Court (opin-

ion by Chief Justice Marshall), and observations of Gidel in his recent work on *The International Law of the Sea*, Vol. II, p. 207.) To this argument the Court replied that while it was not possible to state at exactly what moment the conditions in question were imposed by the Egyptian Government, it went without saying that even if they had not been laid down before the arrival of Greek troops, or their recruiting in the country, such conditions could very well have been accepted at a later date, and this even tacitly, through the failure to make objection. Such, it was held, was in fact the case since, observed the court, the Greek Legation had not at any time claimed any immunity in penal matters beyond that allowed by the general rule stated in the previous case. The plea to the jurisdiction was accordingly rejected (November 23, 1942).

This case is of interest as exhibiting some of the practical inconveniences which would follow the grant of general immunity to a military establishment whose members were entirely composed of men taken from the existing Greek civil population in Egypt, who have been living here all along, with their families, forming part of the business life of the country and subject to its penal jurisdiction. The defendant in the instant case was being prosecuted for an offense of embezzlement of trust-funds committed before the war and his claim of immunity, if allowed, would thus have transferred his case from the civil to the military authorities.

The third decision (*Madero c. Ministère Public*) involved the case of a Spanish member of the Foreign Legion of the Free French Forces. The offense, attempted manslaughter, was committed while the offender was absent without leave from his post. The Court reviewed at length the whole question of military immunity as presented in the highest courts of the countries where the question had arisen, and also the circumstances of the various treaties and less formal arrangements dealing with the subject, especially those concluded during World War I and the present war. The Court laid stress on the distinction to be drawn between the presence of friendly troops in a country with the consent of the territorial sovereign and that of a military occupation. It furthermore declined to allow the argument of the defendant who sought to establish a distinction between the case of seamen and soldiers on the plea that a soldier must always be considered as "on duty." If this were true, said the Court, the long series of decisions and the many discussions on the part of law writers would have been quite beside the point. It was an argument valid only in the case of an occupation intended to protect public order in the occupied country and without application in a case of a simple sojourn in or passage through a country.

The Court refers to a contrary opinion to be found in American law and recognizes that a number of authors share this point of view. It observes, however, that another line of opinion firmly refuses to accept this broad extension of immunity, and that such is the view of the British writers Lawrence and Oppenheim, and is the one which has been held by the British and

Australian governments, as witness the limited terms of the Visiting Forces Act of 1940, which called for a special extension, by legislation in 1942, in order for complete immunity to be granted to American troops in England.

In support of these opinions the Court examines the decisions and opinions given in the Latin American countries, as well as French practice in the matter as far back as 1865, all of which, it observes, militate against the claim to complete immunity. It results from what has been said, concludes the Court, that except in the case of *service commandé* there exists no international usage, of character sufficiently general to be binding, which would extend the claim of immunity to a breach of the criminal law of the country. The conflict of opinions and of practices which have arisen only reveals the complexity of the problem and the necessity for these to be handled by diplomatic agreement, an element which did not exist in the present case. The appeal from the decision of the Assize Court on the question of jurisdiction having been rejected, the accused was remitted to that Court for trial (March 8, 1943).*

SUBSEQUENT DECISIONS

The highest Egyptian courts have subsequently handed down a number of decisions confirming and amplifying their earlier jurisprudence in this interesting field.

The general question as to the jurisdiction of the local criminal courts over members of visiting forces was again presented in the case of three members of the French fleet, which had lain at anchor at Alexandria since the beginning of the war, under conditions amounting to an internment under British control. The sailors were accused of robbing storekeepers by threats of violence. Their career was soon interrupted, as they were discovered at their third attempt. Two of them succeeded in regaining their ships. The other was arrested on shore. All three raised the plea of immunity.

The question went twice to the Court of Cassation, first on an appeal from a conviction on a charge of breaking arrest, and later on an appeal from a conviction of the principal offence, and in both cases the plea was rejected.[1] The decision in the trial court is of interest as having been based squarely on the general principles laid down in the opinion of our Supreme Court in the case of the schooner *Exchange*, 1810.[2]

While dealing with a considerably different state of facts, involving the right of seizure of a schooner, Marshall's opinion, which is often cited by European writers, not always with approval, places the claim for immunity

*It may be of interest to mention that this opinion confirmed an exhaustive opinion in the same case rendered by the Court of Assizes, under the Presidency of a British Judge, and that the bench of the Court of Cassation itself included both an English and an American member.

[1] *Journal des Tribunaux Mixtes*, No. 3257, 21–22, Jan. 1944.

[2] According to Professor Moore (Albert J. Beveridge, Life of Marshall, Vol. IV, p. 21) this was Marshall's greatest opinion in the realm of international law.

in the case of a foreign warship on the ground of implied consent. It emphasizes the practical reasons in support of the claim for immunity—notably the fact that the ship is under the immediate and direct command of the foreign sovereign and is employed in the carrying out of national purposes whose execution would be practically impossible without concessions by the territorial sovereign in the matter of jurisdiction. Testing the particular problem before it by Marshall's reasoning, the Egyptian court found that all reasonable basis for the claim to immunity was lacking in the particular case of the French fleet, which, while nominally under the control of the Vichy Government (a Government no longer enjoying diplomatic privileges in Egypt), had been for a long time past "immobilized in an Egyptian port, deprived of all liberty of movement, and subject to a foreign control."

On appeal, the opinion of the Court of Cassation went upon the broader ground already taken in numerous earlier decisions and which made it unnecessary to examine the particular basis of the decision of the trial court.

In these precedings an additional question of some interest was raised through the fact that two of the accused had regained their vessel without being apprehended by the local authorities, and were subsequently surrendered by their Admiral. The sailors advanced the argument that the question of immunity was one involving a privilege of sovereignty and that the surrender of these sovereign rights by an Admiral was unauthorized and illegal (a position seemingly supported by the French jurists de Merignac and Fauchille). The Courts, both trial and Cassation, held that, even if the alleged illegality were admitted, this would only involve a question as to the relations between the Admiral and the men under his command, without affecting the exercise by the Egyptian Government of a sovereign right based on territorial jurisdiction.

Several new opinions have also been handed down in cases involving the test of *service commandé*. In each case the courts have declined to be bound to by official declarations or certificates of the offender's military commanders. They have also held to their previous ruling which looks primarily to the intention of the authority giving the command rather than to the intention or attitude of the offender himself.

It would seem that the Egyptian courts have been able, in a satisfactory way, to surmount the difficulties, anticipated by Gidel and other text writers, involved in the application of this rather delicate test.

MUNICIPAL PROPERTY UNDER BELLIGERENT OCCUPATION

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One of the most interesting and perplexing of the Hague Regulations of the Rules of Land Warfare of 1907 is Article 56 of Section III. In the prevailing English version the article in question reads as follows:

> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.
>
> All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.[1]

There is nothing particularly perplexing with respect to the general intent of the article as a whole. Indeed, most writers on the subject have considered the article so self-explanatory as it stands that they have dismissed it with a casual reference or have merely repeated the text with perhaps a word of explanation indicating the unanimous desire of civilized nations to give to philanthropic, religious and artistic property the maximum of preferential treatment consistent with the demands of military necessity.[2]

* The opinions or assertions contained herein are the private views of the writer and are not to be construed as official or as reflecting the views of the Navy Department or the naval service at large.—W. M. F.

[1] This is the text as it appears in the United States War Department's Basic Field Manual, Rules of Land Warfare, FM 27–10, pp. 81–82. The French text of the article, which is the only official text, was adopted in its present form by the Hague Conference of 1899 and was repeated without alteration by the Conference of 1907. This official text reads as follows:

"Les biens des communes, ceux des établissements consacrés aux cultes, à la charité et à l'instruction, aux arts et aux sciences, même appartenant à l'Etat, seront traités comme la propriété privée.

"Toute saisie, déstruction ou dégradation intentionelle de semblables établissements, de monuments historiques, d'oeuvres d'art et de science, est interdite et doit être poursuivie."

[2] E.g. Mérignac, A., *La Conférence internationale de la Paix*, Paris, 1900, p. 239; Holls, F. W., The Peace Conference at the Hague, New York, 1900, p. 156; Wilson, G. G. and Tucker, G. F., International Law, New York, 1901, p. 240; Scott, James Brown, The Hague Peace Conferences of 1899 and 1907, Baltimore, 1909, vol. 1, p. 539; Hall, W. E., A Treatise on International Law, Oxford, 1917, p. 444; Garner, James W., International Law and the World War, New York, 1920, vol. 1, pp. 434–435; Fauchille, Paul, *Traité de Droit International Public*, Paris, 1921, vol. 2, p. 249; Hyde, Charles Cheney, International Law, Boston, 1922, vol. 2, p. 397; Oppenheim, L., International Law, London, 1926, 4th ed., p. 266; Freyre, Luis, *Derecho Internacional Publico*, Buenos Aires, 1940, pp. 353–354; Hackworth, Green H., Digest of International Law, Washington, 1943, vol. 6, p. 413. Three writers of note who have dealt with the rules of land warfare at considerable length appear to have considered Article 56 so obvious as not even to require mention; see Nippold, Otfried, *Die zweite*

A few writers, however, have noted that the phrase "property of municipalities" not only stands in an anomalous position with respect to the rest of the article but also raises a number of questions requiring explanation. Mechelynck observed that the sanction contained in the second paragraph of the article does not apply to the property of municipalities although it does apply to the property of the various "institutions" enumerated in the first paragraph of the article.[3] Pillet suggested that the occupant might find it rather difficult to give better treatment to the property of municipalities than to the "patrimoine" of the State itself.[4] Westlake was of the opinion that the word "municipalities" was intended to include "all local bodies."[5] Meurer and Huber felt it significant to note that the article requires preferential treatment for all properties of whatsoever type belonging to municipalities. Meurer believed that the "*höheren Kommunalverbände*" should also be included under the concept of municipalities,[6] while Huber felt that the preferential treatment should be extended to the properties even of provinces, provided that such larger units of local government possessed a juridical and fiscal identity of their own, independent of the State itself.[7] Feilchenfeld, on the other hand, is of the belief that "Article 56 of the Hague Regulations contains a privilege which is expressly granted to municipalities, but is not given to other local subdivisions, as might easily have been done if that had been the intention of the drafters."[8] His conclusion is that "neither the rule nor its real purpose is quite clear" with respect to the property of municipalities.

While the rule as it stands is certainly not clear, these conflicting comments bring us no closer to clarification. In fact, they tend primarily to reveal the unanswered questions which lie concealed in the text itself. Why, for instance, should the drafters of this article have singled out only the property of municipalities for special treatment? And if they actually intended to give to all types of municipal property this extraordinarily preferential position, why did they then apparently desire to exclude such property from the benefits of the sanction contained in the second paragraph of the article? Why was municipal property given what appears to be a special position by virtue of its ownership while the other types of property enumerated in the article are granted special treatment despite their ownership even by the

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Haager Friendenskonferenz, Leipzig, 1908; Fenwick, Charles G., International Law, New York, 1934; De Bustamante y Sirven, Antonio S., *Manual de Derecho International Público*, Habana, 1942, 2nd ed.

[3] Mechelynck, Albert, *La Convention de la Haye*, Ghent, 1915, p. 438.

[4] Pillet, A., *Les Lois Actualles de la Guerre*, Paris, 1901, p. 254.

[5] Westlake, John, International Law, Cambridge, England, 1913, part II, p. 121.

[6] Meurer, Christian, *Das Kriegsrecht der Haager Konferenz*, Munich, 1907, Vol. 2, p. 319.

[7] Huber, Max, "*La propriété publique en cas de guerre sur terre*" (trans. by M. Pilet), *Revue Générale de Droit International Public*, Vol. XX, 1913, pp. 680–686.

[8] Feilchenfeld, Ernst, The International Economic Law of Belligerent Occupation, Washington, 1942, p. 104.

State itself? And finally, if it be assumed that all types of municipal property are to be exempt from seizure as booty and are to be treated in every respect as favorably as private property, how is the conscientious commander in the field to define the word "municipalities" among the heterogeneous forms of local government to be encountered throughout the countries of the globe?

Satisfactory answers to these questions can be found neither in the text of the article itself nor in the court decisions which have touched upon that article. The material available to the writer indicates that in only two cases of any significance has Article 56 been called into reference in connection with the property of municipalities, and in those cases the courts merely alluded to the fact that such property was to be treated as private property under the Hague Regulations.[9] It becomes necessary, therefore, to turn to the pages of history to find out the real intent of the drafters of Article 56 and to determine whether the ambiguities in the text itself are not more apparent than real.

Article 56, like many other articles in the rules of land warfare, did not originate with either of the Peace Conferences at the Hague. The Conference of 1907 simply adopted the article without discussion or alteration from the Hague Regulations of 1899.[10] The first Hague Conference in turn had adopted the article with very little discussion and with only a slight modification from the eighth article of the "Project for an International Declaration concerning the Laws and Customs of War," drawn up by the Brussels Conference of 1874.[11] For all practical purposes, then, the text of what was to be later known as Article 56 originated with the Brussels Conference; but in order to place that text in its proper setting it is necessary for us to go one step further back and to consider for a moment certain relevant provisions in Lieber's Code of 1863, issued by the United States War Department as the famous General Orders No. 100. Article 34 of Francis Lieber's Code read as follows:

> As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observa-

[9] City of Wtodzimierz v. Polish Treasury, Annual Digest of Public International Law Cases, vol. 1931–1932, pp. 449–450; City of Pärnu v. Pärnu Loan Society, the same, Vol. 1935–1937, p. 503.

[10] Scott, James B., The Proceedings of the Hague Peace Conferences, New York, 1921, Vol. III, pp. 17, 240-252; see also report of the Drafting Committee of the 1907 Conference, the same, Vol. I, 1920, pp. 575–576.

[11] The same, Conference of 1899, pp. 563–564, 566. The only alteration made by the 1899 Conference was the insertion of the verb "*est interdite*" in the second paragraph of the article and the dropping of a redundant phrase following the word "*poursuivie*". This modification somewhat strengthened but otherwise in no way altered the original meaning of the text.

> tories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31, but it may be taxed or used when the public service may require it.[12]

Article 35 of Lieber's Code required that classical works of art, libraries, scientific collections, or precious instruments (such as astronomical telescopes), as well as hospitals, should be secured against all possible injury. According to Article 36 such of these properties as might be moved without injury could be used by the conquering state and their ownership could be settled by the subsequent treaty of peace. In no case, however, were they to be sold or given away, nor should "they ever be privately appropriated, or wantonly destroyed or injured." It may be safely assumed that in drafting this portion of his code, Lieber was not uninfluenced by the famous restitution by the Allied Powers of the historic monuments and works of art pilfered by Napoleon.[13]

In view of the wide-spread influence of Lieber's Code it is not surprising that a reflection of the sections cited was to be found in the original Russian draft project which served as the basis for discussion at the Brussels Conference of 1874.[14] Article 8 of this Russian draft was worded as follows:

> *La propriété des églises, des établissements de charité et d'instruction, de toutes les institutions consacrées à des buts scientifiques, artistiques et de bienfaisance, n'est pas sujette à prise de possession par l'armée d'occupation.*[15]

It will be noted at once that neither the Russian draft of 1874 nor the related sections of Lieber's Code made any reference whatever to the properties of municipalities as such. The emphasis was placed entirely on the worthy character of the property in question, regardless of its ownership. The exclusively humanitarian, artistic, or intellectual purposes to which such properties are dedicated seemed to justify their being regarded as the "*res sanctae*" of what was thought in the mid-nineteenth century to be an increasingly civilized world.

The insertion of the phrase "*biens des communes*" (property of municipalities) into the original Russian draft was made, oddly enough, at the request of the Prussian Major General von Voigts-Rhetz, the ranking member of the German delegation at the Brussels Conference. In the course of the

[12] The text of Lieber's Code may be conveniently found in the appendix to the 1901 edition of Wilson and Tucker, as cited.

[13] For discussion of the importance of the Allied decision to restore these *objets d'art*, see Wheaton, Henry, Elements of International Law, 8th ed. with notes by R. H. Dana, Jr., Boston, 1866, pp. 431–432; 447–449; Fauchille, work cited, pp. 251–252; Garner, work cited, Vol. 1, pp. 434–435.

[14] For influence of Lieber's Code on the Brussels Conference see Scott, J. B., The Hague Peace Conferences of 1899 and 1907, Baltimore, 1909, vol. 1, p. 545; also this JOURNAL, Amos S. Hershey, "International Law since the Peace of Westphalia" Vol. 6 (1912), p. 52.

[15] *Actes de la Conférence de Bruxelles de 1874*, Paris, Librairie des publications législatives, 1874, p. 5; to be subsequently cited as *Actes*.

discussion of the Russian text General von Voigts-Rhetz remarked, somewhat as an afterthought, that "communes" ought to be inserted "*dans l'énumeration du §8,*" i.e. along with churches and the other enumerated types of charitable, artistic, educational and scientific establishments.[16] No material available to the writer adequately explains the motives which induced the leader of the German delegation to make this suggestion, but there is ample evidence to indicate that in so doing the General had no intention of extending preferential treatment to any class of property not already envisaged in the Russian draft.[17] Indeed, it was the same General von Voigts-Rhetz who insisted, almost in the same breath, that Article 8 could not and should not prevent the occupant from using convents, museums and churches as barracks, field hospitals and observation posts if necessity should so dictate.[18] It is worth recalling in this connection that the Germany of 1874 was the avowed champion of the military in general and of the occupying power in particular. Her delegates to the Brussels Conference made no secret of their attitude in this matter, and General von Voigts-Rhetz was especially energetic in opposing any suggestion made at the Conference which would place additional restrictions on the rights of the occupant or would tend in any way to cast unfavorable reflections on the recent actions of the German army in occupied France.[19]

The General's proposal to mention "communes" in Article 8 was accepted by the Conference as a minor clarification requiring no discussion. The Italian delegate, Count Lanza, supported the General's motion and suggested that the drafting committee might simply insert the words "*biens des communes,*"—a suggestion which was promptly approved and embodied in the following redraft:

> *Les biens des églises, des communes, ceux des établissements de charité et d'instruction, de toutes les institutions consacrées à des buts scientifiques, artistiques et de bien faisance, même appartenant à l'Etat, seront traités comme la propriété privée.*[20]

Three points in this redraft are worth noting: (1) The degree of prefer-

[16] *Actes* . . . , p. 28.

[17] It is interesting to speculate on the General's motives. Perhaps von Voigts-Rhetz or his legal advisor, Dr. Bluntschli, recalled that a considerable number of the art objects seized by Napoleon had belonged to communes and various local bodies. Or perhaps the suggestion was motivated by the ideology of the *Kulturkampf*, as a result of which a large number of social functions formerly carried on by the churches were being taken over by the local civil governments. We know that the *Kulturkampf* was at its height in the summer of 1874 and that Dr. Bluntschli was an outspoken supporter of Bismarck's policies *vis-à-vis* the Church. See Kissling, J. W., *Geschichte des Kulturkampfes im Deutschen Reiche*, Freiburg in Breisgau, 1916, vol. 3, pp. 159–160; also Goyau, Georges, *Bismarck et l'église*, Paris, 1911, Vol. 2, pp. 202–203.

[18] *Actes* . . . , p. 28.

[19] E.g. see remarks of the General concerning "right" of bombardment (*Actes* . . . , p. 9), "right" to use force against recalcitrant prisoners of war (p. 13), "right" to treat as war criminals those who take arms in a *levée en masse* (p. 33), the "impossibility" of paying cash for requisitions (p. 35), etc.

[20] *Actes* . . . , p. 28.

ential treatment demanded by the article was reduced by changing the phrase "*n'est pas sujette à prise de possession*" into the milder form "are to be treated as private property." (2) The word "*communes*" was added but it was not given the initial and distinct position in the paragraph which it was subsequently to assume. It was inserted merely as a correlative to the word "*églises*" and the correlative functions of charity and education were brought out by the appositive clause immediately following the word "*communes.*" (3) The simultaneous addition of the phrase "even belonging to the State" served to emphasize more clearly than before that it was the character of these properties which was the determining factor, rather than their ownership status. Although this phrase might be interpreted as modifying only the word "*institutions,*" it can hardly be doubted that it was intended to apply to all types of properties previously mentioned in the sentence.

To the men of 1874 the insertion of the word "communes" in Article 8 appeared in no way as an important addition or alteration. The British delegate at Brussels, who reported critically and in detail on every phase of the work of the Conference, did not even consider it worthy of mention in his despatches to Lord Derby, although he had previously considered it significant to report that the Russians had added the word "*artistiques*" to their original draft of Article 8 before the latter was presented formally to the assembled delegates![21] Even more significant is the fact that when the Belgian delegation about a week later presented a new draft of Article 8, designed solely to strengthen and extend the article as much as possible in favor of the occupied state, said Belgian draft omitted entirely any reference to the property of communes. The wording of the suggested Belgian redraft was as follows:

> *L'armée d'occupation ne peut prendre possession des églises, hôspitaux, établissements de charité ou d'instruction, à moins qu'ils ne soient indispensables pour l'installation des malades et des blessés, non plus que des musées, des bibliotèques ou des établissements renfermant des collections scientifiques ou artistiques.*
>
> *Toute déstruction ou dégradation intentionelle des établissements ci-desud énuméré, de leur mobilier, des oeuvres d'art ou de science, ainsi que des monuments publics ou historiques doit être poursuivie par l'autorité compétente.*[22]

As might have been expected, it was General von Voigts-Rhetz who led the attack against the highly restrictive provisions of the first paragraph of the

[21] British and Foreign State Papers, Vol. LXV, 1881, pp. 1037, 1074–1075; the original version of the Russian project as circulated to the foreign offices of Europe did not contain the word "*artistiques*"; the same, pp. 1006–1007. In order to judge the significance of the silence of the British delegate respecting the addition of the word "*communes*" it is worth recalling that the British delegate attended the Conference only on the specific provisos that the conference would not discuss maritime law and would not commit Great Britain to any "new obligations or engagements of any kind in regard to general principles." The same, Vol. LXVI, p. 445, the Earl of Derby to Lord A. Loftus.

[22] *Actes* . . . , p. 44.

Belgian draft. That the reference to the property of communes was omitted in the Belgian draft was a matter of no real concern to the General: what really worried him, and other delegates as well, was that unequivocal phrase "*ne peut prendre possession.*" Leading the opposition, von Voigts-Rhetz insisted that Article 8 must not conflict with the realities of military necessity, which might well force an army to use churches as barracks or even "to take food supplies from religious institutions."[23] The verbal battle which ensued was short but decisive and resulted in the prompt rejection of the first paragraph of the Belgian proposal. As a measure of conciliation and compromise, however, it was decided that the second paragraph of the Belgian draft might be added as a second paragraph to the already approved text of Article 8. It was also decided at this time, in response to a pointed query from the Turkish delegate, that it would be desirable to substitute the expression "*édifices consacrées aux cultes*" for the more restricted, Christian word "*églises.*" Bearing these decisions in mind, the drafting committee then went to work and produced the following unhappy text which was incorporated without further change into the final act of the Brussels Conference:

> *Les biens des communes, ceux des établissements consacrées aux cultes, à la charité et d'instruction, aux arts et aux sciences, même appartenant à l'Etat, seront traités comme la propriété privée.*
>
> *Toute saisie, déstruction ou dégradation intentionelle de semblables établissements, comme ainsi des monuments, des oeuvres d'art ou des musées scientifiques, doit être poursuivie par l'autorité compétente.*[24]

It will be immediately apparent that this draft was not an entirely accurate rendition of the prevailing sense of the Conference respecting the subject matter of Article 8. Prior to this draft, for instance, there had been no thought of treating the property of communes any differently from that of the other types of institutions named in the article. This text, however, seems to draw such a distinction, in so far as the word "*établissements*" in the second paragraph appears to refer back only to the "*établissements*" mentioned in the first paragraph and not to the "*biens des communes.*"[25] While such a distinction may be justified by a strictly textual construction of the article as it stands, it does not accord with common logic or with the known evolution of the article itself. No such distinction was made in the Belgian draft, where the second, or sanction, paragraph logically referred to all the "*établissements*" enumerated in the first paragraph of that draft. It will be recalled, however, that the first paragraph of the Belgian draft had failed to

[23] The same.

[24] *Actes* . . . , p. 56. This text is actually the final and official French version of what came to be Article 56 of the Hague Conventions, except for the subsequent insertion of the verb "*est interdite*" and the dropping of the redundant final phrase "*par l'autorité compétente.*" Above, note 11, p. 385.

[25] This is the distinction to which Albert Mechelynck called attention, see above, p. 384.

mention the word "*communes*" which had been inserted by the Conference into the first paragraph of the Russian text of the article. Thus it came about that when the drafting committee added the second paragraph of the Belgian draft to the first paragraph of the amended Russian text, the hybrid resultant did not adequately cover the phrase "*biens des communes.*"

Another element of this discrepancy is to be found in the surprisingly prominent and distinct position which this final draft gives to the phrase "*biens des communes.*" Not only does this phrase come first in the article; it is also set off syntactically from the remainder of the first sentence in a manner neither envisaged in the earlier drafts nor justified by the attitude of the Conference toward this particular type of property. The conclusion would seem to be justified that this unfortunate shift in word order resulted from the desire of the drafting committee to avoid the extremely awkward construction which would otherwise have resulted from the simple substitution of the phrase "*édifices consacrées aux cultes*" for the single word "*églises*" as it occurred in the previous draft of the article.

The sudden prominence and emphasis which the final draft gave to the phrase "*biens des communes*" did, however, serve the useful purpose of stimulating a certain amount of belated interest in just what those words might involve. One of the Italian delegates, Baron Blanc, wondered if it would not be advisable to mention in particular "public archives and the records of vital statistics (*actes de l'état civil*)."[26] M. Faider of Belgium replied that while the phrase would obviously cover such records, it would also include a number of other similar establishments, such as "land register offices, repositories of civil contracts and notarial records." It was his opinion that all such properties *by their very nature* would be respected by any army and that it would be unwise to draw up a list of them which would at best be incomplete.[27] This attitude was warmly supported (although with a marked shift in emphasis) by the German delegation. Geheimrat Dr. Bluntschli pointed out that the article could not prevent the occupant from using such public records as he might need for imposing taxes and making requisitions. With considerable less subtlety, General von Voigts-Rhetz expressed the opinion that such a list would be highly unsatisfactory since the occupant would be entitled in any event to seize all plans, documents or records of military value, provided, of course, that he gave a receipt for same.[28] Agreement on this point being clearly unattainable, the Conference moved on to more fruitful fields for discussion, and from that day to this the phrase "*biens des communes*" has never been officially defined.

We have already seen, however, that when the Conference inserted the word "*communes*" into the text of Article 8, the term was regarded as illustrative rather than definitive. That is to say, to the men of 1874 the property of communes was not considered a type of property essentially distinct

[26] *Actes* . . . , p. 50.

[27] The same. The italics are those of the present writer.

[28] The same.

from the other forms of humanitarian, historical, artistic and educational properties which constituted the subject and *raison d'être* of the article in question. Communes, like churches, were merely mentioned as being typical and customary owners of property of this general type,—property of which the very nature entitled it to more favorable treatment and more complete protection than that accorded to any other type of property dealt with in the rules of land warfare. This conclusion would seem to be justified not only by the manner in which the subject was discussed at the Conference but also by the type of communal or municipal activity prevailing in the mid-nineteenth century. It is further supported by the specific statement made by Dr. Bluntschli regarding this matter in the 1878 edition of his *Völkerrecht.* In explanation of Article 8 of the final act of the Brussels Conference, Bluntschli wrote as follows:

> *Da die Gemeinden vorzugsweise eine wirtschlaftliche und Culturbedeutung haben, so sind ihre Güter in der Regel der Occupation entzogen. So weit aber die Gemeinde auch militärische Anstalten besitzt, so weit verfallen dieselben selbstverständlich der feindlichen Kriegsgewalt.*[29]

In other words, it was never the intention of the drafters of Article 8 to give this highly preferential treatment to any and all types of property owned by communes, simply upon the basis of their ownership as such. The criterion for according this special treatment lay exclusively in the non-military nature of such properties and the outstandingly worthy causes to which they are dedicated. It was solely this aspect of *res sanctae* which was thought to justify their receiving the protection of the special sanction, found only in the second paragraph of Article 8, which was designed to bring to justice the perpetrator of acts of vandalism against such properties.

It was probably because of the emphasis on the nature of the properties referred to in Article 8 that neither the Brussels Conference nor the subsequent Hague Conferences ever considered it necessary to define that shadowy word "*communes*" which was later to perplex such writers as Meurer, Huber, and Feilchenfeld.[30] Since the drafters were interested in defining the property mentioned in Article 8 by character rather than by ownership, they intentionally used a broad and indefinite generic term, of which the variety of translations (even in authoritative texts) illustrates the futility of attempting to define the word in terms of a specific unit of local government. The official translation, for instance, which the British delegate at the Brussels Conference sent back to Lord Derby used the word "parishes" with "*communes*" written in parentheses.[31] Similarly the German texts have always rendered

[29] Bluntschli, J. C., *Das Moderne Völkerrecht der Civilisirten Staten,* Nördlingen, 1878, p. 365. Present writer's translation of portion cited: "Since communes primarily have a social and cultural significance, their properties are removed from the general rule of occupation. If the commune, however, also possesses military installations, then the latter would naturally be subject to the military authority of the enemy."

[30] Above, p. 384.

[31] British and Foreign State Papers, 1861, Vol. LXV, p. 1076.

the word as "*Gemeinde,*" signifying either a parish or a comparable unit of local civil government. The translation sent to the Department of State by the then American Legation at St. Petersburg in 1874 used the word "corporations."[32] The quasi-official American and British translations of the 1899 text simply took over the word "*communes*" from the official French text and did not attempt to indicate any English equivalent.[33] The handbook prepared by T. E. Holland and issued in 1904 "for the information of all ranks of His Majesty's land forces" translates the word as "localities,"[34] while Huber mentions another authoritative British translation which employs the expression "local authorities."[35] The word "municipalities" was first used in the English translation of the 1907 Hague Regulations and since that time it has tended to become the standard rendition in English.[36] In that same year, however, this JOURNAL used the word "parishes" in its version of the Brussels Conference text, while Pitt Cobbett and John Westlake have regularly used the expression "local bodies" in their references to either the Brussels or Hague texts.[37] From these citations it is clear that the word "*communes*" has a far broader connotation and a less precise denotation than the term "municipalities" used in the prevailing English translation of the article. From the evolution of the text itself it would appear that a more accurate rendition of the true meaning of the term might have been "communal property" or "collective property," either of which would have brought out the essential characteristic of the property in question without implying that its ownership had of necessity to be defined in terms of any specific local unit, be it parish, town or province.[38]

Bearing in mind the tentative conclusions suggested by the foregoing analysis of Article 56, let us examine briefly certain other passages in Section III of the Rules of Land Warfare which may throw additional light on the

[32] Papers Relating to the Foreign Relations of the United States, 1875, Vol. II, p. 1017.

[33] The same, 1899, p. 546; British Parliamentary Papers, 1899, Misc. No. 1, "Correspondence respecting the Peace Conference at the Hague," p. 334.

[34] Holland, T. E., The Laws and Customs of War on Land as defined by the Hague Convention of 1899, London, 1904, issued by the War Office.

[35] Huber, as cited, p. 686. Since Huber cited these words in English, such a translation undoubtedly exists, although the present writer was unable to find it.

[36] The official French text remained unchanged in 1907 but for some unknown reason, to which no reference is made in the Proceedings of the Conference, the American, British and Spanish translations changed "communes" to "municipalities"; cf. British Parliamentary Papers, Misc. No. 1, 1908, "Correspondence respecting the Second Peace Conference at the Hague," Cd. 3857, p. 90; also Scott, J. B., The Hague Conventions and Declarations of 1899 and 1907, New York, 1915, p. 127; see also p. 127 in the French and Spanish editions of the same work.

[37] This JOURNAL, Vol. 1 (1907), Supplement, p. 97; Pitt Cobbett, Leading Cases on International Law, London, 1924, Vol. 2, p. 172; Westlake, as cited, p. 121.

[38] The expression "*bienes communales*" was actually used in the 1899 Spanish translation of the article, while the phrase "*propriété collective*" was used in referring to the subject of Article 8 by M. deMartens of Russia, the president of the Second Commission and Second Subcommission; see Scott, Proceedings of the Hague Peace Conferences, 1899, p. 488.

real intent of the drafters respecting the treatment and definition of "municipal" property under belligerent occupation. Except for Article 56 the word "municipalities" or "*communes*" occurs only in Article 52 of which the first two paragraphs read as follows:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in the operations of the war against their country.
>
> Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.[39]

At first reading there would appear to be a certain conflict between the spirit of this article and that of Article 56 respecting the treatment of municipal property. Article 56, although not excluding the ultimate possibility of requisitioning "*les biens des communes*," certainly stresses and even sanctions the inviolability of such property. Article 52, on the other hand, appears to grant such right of requisition as a matter of course, provided that certain formalities and conditions are observed by the occupant. A closer analysis of Article 52, however, reveals that it was never intended to confirm any general right to requisition such philanthropic, educational or artistic communal properties as were placed in a special category by Article 56. From the discussions at the Brussels Conference it appears that the sort of property envisaged for requisition under Article 52 would consist of such items as food, clothing, lodging, wagons, horses, and harness equipment.[40] It was the assumption that all such properties would be privately owned and that the occupant might requisition them either individually from their owners or collectively through the commune. In Article 52, therefore, it was a question not of requisitioning communal property but rather of requisitioning private property through the medium of the communal organization.

It is significant that there is no mention of communes in the second paragraph of Article 53 (Brussels Article 6), which confirms the right of the occupant to seize all means of transportation and communication, depots of arms and all kinds of ammunition, "even if they belong to private individuals."[41] The omission of any reference to communes in this paragraph would seem to support the idea that the drafters of the article did not consider such articles of military value as being likely "*biens des communes*" within the sense of Article 56. As Bluntschli said, the communes were regarded as having primarily a "cultural significance."[42]

Respecting public moneys, there are two articles which have a direct

[39] *FM 27–10, Rules of Land Warfare*, p. 84. Neither at Brussels nor at the Hague was there any discussion of the word "municipalities" in connection with Article 52.

[40] *Actes . . .*, pp. 35–36.

[41] *FM 27–10, Rules of Land Warfare*, p. 83. For Brussels Conference text see *Actes . . .*, p. 61.

[42] Cf. above, p. 391.

bearing on the treatment of municipalities, i.e. Articles 53 and 48. The first sentence of Article 53 states that "an army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State. . . ."[43] While this clause undoubtedly has the effect of limiting the power of the occupant over the cash, funds and realizable securities of all units of local government possessing a fiscal identity distinct from that of the State, it is interesting to note that this was not the primary intent of the drafters of the article. The original Russian draft of Article 6 of the Brussels Project permitted the occupant to seize "*tous les capitaux du Gouvernement.*"[44] In the course of the Brussels Conference this wording was altered to its present form, but not out of any expressed desire to give preferential treatment to the funds of local governmental units as such. On the contrary, the modification was made in order to preserve from the occupant such funds as postal savings, pensions and veterans' allowances, which, although held by the State as "*propriétaire,*" were not "strictly the property of the State" but were actually private property.[45]

With respect to Article 48 the evolution was markedly different but none the less pertinent to our problem. This article, which in its present form dates from the Hague Conference of 1899, reads as follows:

> If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was so bound.[46]

The initial clause of this article implies, but does not clearly state, that the occupant is not to collect any taxes except those imposed for the benefit of the national Government. Actually the present text is somewhat less emphatic on this point than was the original article of the Brussels Project from which it evolved. Article 5 of the Brussels text specified that "*L'armée d'occupation ne prélèvera que les impôts, redevances, droits et péages déjà établis au profit de l'Etat . . .*," and it was the expressed intention of the Conference that this provision should exclude provincial and communal taxes.[47] The desirability of this exclusion appears to have been predicated on two assumptions: (1) that local taxes were used primarily to support the worthy "*biens des communes*" referred to in Article 8 of the Brussels text; (2) that local functionaries, as opposed to those of the national State, would continue to carry on their customary and essentially social functions under belligerent occupation.[48] The validity of this second assumption was questioned by the Ser-

[43] *FM 27-10*, p. 82. [44] *Actes . . .*, p. 4.

[45] The same, p. 25, remarks of the Swiss delegate Colonel Hammer; p. 49, remarks of the Russian delegate M. Martens.

[46] *FM 27-10, Rules of Land Warfare*, p. 77. [47] *Actes . . .*, p. 44.

[48] This assumption was the basis for the original Article 4 of the Brussels Project which was

bian delegate to the first Hague Conference, who pointed out that if the local authorities were unable to exercise their normal function of collecting municipal taxes and county rates, then it would be "proper for the occupant whose power is substituted for that of the authorities, to take possession of the said taxes."[49] The Conference, however, was not in a mood to consider any extension, no matter how logical, of the powers of the occupant respecting the collection of taxes. In fact, at that very moment a number of delegations, led by the Dutch and Belgian groups, were pressing for the entire abolition of the Brussels text on the ground that it confirmed the right of the occupant to collect any taxes. As a compromise, it was finally decided that the clause should remain essentially as it was in the 1874 draft but that it should be tempered by being put in the conditional form.

. . . . .

While a careful study of all pertinent court decisions since the 1870's might reveal certain interpretations and criteria not fully indicated in the proceedings of the Brussels and Hague Conferences, it would appear that on the basis of the foregoing analysis of texts and minutes the following conclusions might be drawn:

1. The real subject of Article 56 is property of a distinctly artistic, historical, scientific, religious or educational character, regardless of the ownership status of such properties.

2. The reference in the article to the properties of "municipalities" or "*communes*" was added as an after-thought and was considered illustrative rather than definitive. It was felt that the property of communes would all fall within the category of humanitarian or intellectual properties with perhaps the exception of public records and archives which justified the special mention of "*biens des communes*" in the article.

3. It was not the intention of the drafters of the article to grant the highly preferential treatment of Article 56 to all types of property owned by municipalities, simply on the basis of their ownership. Military installations maintained by municipalities and all other types of property owned by municipalities which would be susceptible of direct military use and were not dedicated to humanitarian, educational, scientific or artistic purposes do not enjoy the protection of Article 56.

4. For this reason it was never thought necessary to define the word "*communes*" in terms of any specific unit of local government. The expression was intended to include communal property, such as poor houses, asylums,

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voted down in 1899. It was well expressed in the words of Baron Baude, the leading French delegate to the Brussels Conference:

> "*. . . il existe une différence entre les fonctionnaires du gouvernement et les fonctionnaires municipaux. Les premiers doivent se retirer devant l'ennemi; les seconds, au contraire, ne peuvent séparer leur sort de celui de la ville.*" See *Actes* . . . , p. 23 and p. 61 (text of Art. 4).

[49] Scott, Proceedings of the Hague Peace Conferences, 1899, p. 523.

park buildings, museums and public records, whether owned by a parish, a town or a province.

5. It was not the original intention of the drafters of the article to place the unimportant reference to "*biens des communes*" in the important position of the initial phrase of the article. Careless drafting, rather than well-considered intent, was responsible for this misleading word order, which also tended to give the erroneous impression that the second paragraph of the article (the sanction paragraph) was not intended to cover the "*biens des communes.*" If the property of municipalities as interpreted by the drafters had not been felt worthy of the protection of this sanction, it would not have been inserted into the article at all.

6. Under Article 53 the cash, funds and realizable securities owned by a local governmental unit are exempt from seizure, although this was not the prime reason which motivated the drafting of the article as it now stands.

7. It was the expressed desire of the drafters to prevent the occupant from collecting the taxes imposed exclusively for the benefit of local organs of government, but this desire was based on the assumption that local functionaries would remain in office to collect such taxes themselves. In the event of the flight of local functionaries, such a distinction between the collection of local, as opposed to national, taxes under belligerent occupation would appear to be meaningless.

RECENT DEVELOPMENTS IN THE TREATMENT OF CIVILIAN ALIEN ENEMIES

By Robert R. Wilson

Of the Board of Editors

The treatment of civilian alien enemies, either in the national jurisdiction of a belligerent or in occupied territory, presents questions of public international law as well as of municipal law and administration.[1] It appears that in some of the United Nations in the present war the problem of internment of such persons has become less acute as the tide of battle has turned against the Axis. In Great Britain, for example, the number of aliens of enemy nationality interned under the Royal Prerogative, and whose release had not been authorized, was only 6,123 at the beginning of 1944 as compared with 17,940 at the beginning of 1941.[2] Any adequate survey of practice during the current war must await the time when complete documentation is available. Meanwhile, some recent developments merit consideration from the point of view of customary and treaty law. For the present purpose attention will be restricted to certain aspects of the general subject. The items to be noted will include (1) treatment of American civilians within Japanese or Japanese-controlled territory, (2) German treatment of American civilians in contrast to her treatment of persons of certain other nationalities, and (3) treatment of Japanese nationals in relocation centers in the United States.

There have been, at some time during the present war in the Pacific, an estimated twelve to thirteen thousand American civilians in territory under Japanese control.[3] Through an exchange effected in July, 1942, over 1,300

[1] R. R. Wilson, "Treatment of Civilian Alien Enemies," this Journal, Vol. 37 (1943), pp. 30–45. On the desirability of discontinuing the use of "enemy alien" as a designation of all persons from the territory of the enemy, see Charles Gordon, "Status of Enemy Nationals in the United States," Lawyers Guild Review, Vol. II (1942), pp. 9–20.

[2] Statement of the Home Secretary in the House of Commons, Feb. 11, 1943, Parliamentary Debates, 5th ser., Vol. 386, p. 1436. In March, 1942, it had been stated that there were approximately 1,200 Japanese interned in the British Dominions. Same, Vol. 378, p. 1678.

[3] The number, including those interned and those not interned, was given as approximately 10,000 after the exchange of 1942 and 1943, in a statement of Assistant Secretary of State Long on November 24, 1943 (Hearings cited in note 31, below, Pt. 4, p. 240). The Assistant Secretary said that the American civilians in custody were generally in the hands of Japanese civilians.

Another estimate has put the number of American civilians still in the Far East at 8,300. Approximately 1,000 are said to be in hospitals or interned in their own homes. About 6,000 are said to be in internment camps, most of them located in the Philippines (four camps), in Shanghai (two camps), or in Weihsien in North China (one camp). John Cotton, "Civilian Internment Camps in the Far East," Prisoners of War Bulletin, Vol. 2, No. 2 (Feb., 1944), pp. 2–4.

Americans, officials and non-officials, were repatriated from the Far East. The exchange completed in October, 1943, brought home approximately 1,240 nationals of the United States, together with 260 nationals of other American republics and of Canada.[4] The Japanese Government subsequently declined to discuss further exchanges, on the ground that it desired "first to receive clarification on certain points respecting the treatment of Japanese nationals in the United States." [5]

As is well known, the Japanese Government agreed, early in the course of the war with the United States, to apply reciprocally the provisions of the Geneva Prisoners of War Convention, 1929,[6] in so far as its provisions were not clearly inapplicable to civilian internees.[7]

Difficulties soon developed, even in the matter of sending relief to those in custody. In accordance with the letter and spirit of the 1929 Convention, the American Red Cross made efforts, beginning early in 1942, looking to the shipment of relief supplies to civilians interned (as well as prisoners of war) in the hands of the Japanese. The latter, however, expressed unwillingness, for strategic reasons, to grant a safe-conduct for any non-Japanese vessel to move in Japanese waters. At first they also declined to send a Japanese ship to bring in such supplies, but in May of 1944 the Tokyo radio announced that the Japanese were notifying the United States of their willingness to have a Japanese ship proceed to Vladivostok in order to pick up supplies which had been accumulating there for some months, for prisoners of war and civilian internees.[8] A quantity of relief supplies had previously reached these Americans when the *Gripsholm* made its two voyages to the Far East, the cargo being transshipped at Marmagoa to the Japanese ship *Teia Maru*. Preliminary reports received by cable from the International Committee of the Red Cross show distribution to prisoners of war and civilian internees in each geographical section.[9] The Japanese Government has also permitted the transfer of funds, through the medium of the protecting Power, to persons interned.[10] Late in May, 1944, it was publicly announced that the Japanese had given approval for the purchase of relief supplies to a value of $25,000 monthly for civilian internees and prisoners of war in the Philippine Islands.[11]

In their treatment of those interned, the Japanese are legally obligated, by adaptation of the Geneva Convention, to conform to humanitarian standards in the matters of shelter and diet, correspondence, medical care, and

[4] Department of State Bulletin, Jan. 15, 1944, p. 79. [5] Same, p. 78.

[6] 47 Statutes at Large, 2021, this JOURNAL, Vol. 27 (1933), Supplement, pp. 59–86.

[7] A condition inserted in the agreement was that there should be no involuntary labor on the part of civilians (i.e., labor other than that connected with administration, maintenance, and management of internment camps). Department of State Bulletin, May 23, 1942, p. 446. [8] New York Times, May 9, 1944, p. 10.

[9] Prisoners of War Bulletin, Vol. 2, No. 5 (May, 1944), p. 1.

[10] Department of State Bulletin, Jan. 15, 1944, pp. 81–84.

[11] New York Times, May 24, 1944, p. 7.

pay for labor if internees elect to work. Inmates of camps are also entitled, as of right, to certain opportunities of an intellectual, recreational, and religious sort. The course of action which the Japanese have actually followed seems to have varied somewhat in different localities.[12] In the Philippines, Japanese authorities are reported to give camp committees one peso per person per day for purchase of food and other items required for maintenance of camps; because of shortages, diet is restricted, but internees with funds may use them to purchase some supplementary food.[13] Assistant Secretary of State Long, in a statement made late in November, 1943, said that shelter provided for the interned civilians was fairly good, but that the food was poor, the base ration being insufficient to support a healthfully vigorous American.[14]

The United States Government has subsequently made grave charges of failure to conform to agreed rules. Following the publication, late in January, 1944, of eye-witnesses' accounts of Japanese atrocities against American and Filipino prisoners taken in the Philippine Islands, the Department of State made public the fact of no less than eighty-seven separate representations and protests which it had made in 1942 and 1943 because of Japanese failure to observe "the international common law of decency." Many of these protests related to civilians exclusively, others to civilians along with prisoners of war. The American Government especially emphasized the failure of the Japanese to permit Swiss representatives to visit camps and interview internees without witnesses. As late as December 2, 1943, in the twenty-fourth month of the war, the United States protested that the Japanese Government had refused to report the names of all civilians held in internment camps.[15] On January 27, 1944, the Department of State transmitted through the Swiss Government an extended and comprehensive statement in protest against "deprivations of rights, cruelties, wanton neglect, mistreatment and hardships," under eighteen principal categories, nearly all of which had some applicability to civilians.[16]

[12] As of March, 1944, for example, the Japanese had refused assent to the appointment of Delegates of the International Committee of the Red Cross to the Philippines, Thailand, Singapore, and the Netherlands Indies. (Statement of Maurice Pate, Director, Prisoners of War Relief, American Red Cross, in Prisoners of War Bulletin, Vol. 2, No. 3 (Mar., 1944), p. 2.)

[13] John Cotton, as cited (note 3, above), p. 3.

[14] Hearings cited in note 31, below, Pt. 4, p. 240. See also the statement by the same official as reported in New York Times, Feb. 17, 1944, p. 6.

[15] New York Times, Feb. 17, 1944, p. 6.

[16] Department of State Bulletin, Feb. 12, 1944, pp. 168–175.

Among the charges were: that Swiss representatives had not been permitted to go to every place of internment, to interview without witnesses, or to have access to all places occupied by the prisoners; that representatives of the International Red Cross had been refused permission to visit most of the places where American nationals are held; that Americans have not been permitted to forward complaints to Japanese holding authorities or representatives of the protecting Power; that the Japanese have confiscated personal effects of internees and have subjected them to insults and public curiosity; that the Japanese have refused to pro-

From the European theatre of war, the story is somewhat different. Insofar as American and British internees are concerned, this war has not as yet brought such serious charges against Germany as have been made against Japan. Observance of decencies as toward the two nationalities mentioned, however, has been offset by shocking treatment of other peoples. The principal United Nations have taken occasion to make solemn pronouncements concerning war crimes,[17] many of which have grown out of the treatment of civilians. In Russia the trial and execution at Kharkov of individuals charged with war crimes afford grim evidence of feeling against the expelled invaders. Russian estimates place at more than two million the number of civilians in the Soviet Union whom the Germans have killed.[18] The proportion of these who were alleged guerrillas is not known.[19] However, the fact of extensive underground activity and guerrilla operations against a belligerent affords no legal justification for mistreatment of civilians who have clearly committed no act inconsistent with non-combatant status.[20]

Forced migration and labor have characterized German policy. In February, 1944, it was estimated that out of 29 million workers in the Reich, 12 million were foreigners.[21] Of an estimated 450,000 Dutch workers forced to labor in German factories, some 15,000 are reported to have escaped or failed to return from leave.[22] It is obvious that there may be ap-

vide health-sustaining food or to permit the United States to make provision for shipping supplemental food and medical supplies; that the Japanese had, contrary to specific agreement, compelled civilians to perform labor other than that connected with administration, maintenance and management of internment camps; that adequate medical care had in many instances been denied; that complete lists of internees had not been furnished; that internees had not been permitted freely to exercise their religion; that the Japanese had not posted the 1929 Convention in camps in English translation, thus depriving internees of knowledge of their rights thereunder; that, through failure to provide adequate equipment and accommodations the Japanese had forced internees to subsist in inhumane conditions.

[17] See, for example, the statement of President Roosevelt, as reproduced in Department of State Bulletin, Oct. 10, 1942, p. 797, and Prime Minister Churchill's statement before the House of Commons on Sept. 8, 1942, in Parliamentary Debates, 5th Ser., Vol. 383, p. 97. See generally, on mistreatment of civilians of various United Nations, Punishment of War Criminals, a recent undated publication of the United Nations Information Office.

[18] New York Times, May 8, 1944, p. 5 (reproducing estimate of the Russian publication, War and the Working Class), and May 13, 1944, p. 4 (reproducing a statement of the Soviet Embassy Information Bulletin). The Soviet Extraordinary Commission for Investigation of German Atrocities charged that Germans in the Rovno region of Poland had murdered more than 102,000 civilians and prisoners of war.

[19] For a comment on the subject of guerrilla status, see G. G. Wilson, "The Guerrilla and the Lawful Combatant," this JOURNAL, Vol. 37 (1943), pp. 494–5.

[20] That such acts have not been local to the Eastern front is suggested by the Badoglio Government's charge that Germans had killed thirty Italian civilians (women, children, and old men) at the village of Sant' Agata, in reprisal for the operation of Italian patriot troops behind German lines. New York Times, Feb. 24, 1944, p. 4.

[21] Taylor Henry's dispatch from Portugal, New York Times, Feb. 28, 1944, p. 5.

[22] New York Times, May 8, 1944, p. 8. It was also reported that 12,000 Dutch patriots were held by the Germans as political prisoners.

pearance of consent to migration (from an occupied country) through an unscrupulous belligerent's administration of food rationing. It is also true that not all the belligerents in the present war have become bound *inter se* by the Prisoners of War Convention of 1929, and have not through adaptation agreed to apply its principles to the treatment of civilian alien enemies. Germany and Russia have not become so bound in their relations with each other. However, even in such circumstances the basic principles of humanitarianism as indicated in Hague Convention IV of 1907 still apply for these belligerents. Forced migration of laborers has been held to be inconsistent with these principles.[23]

Whatever the motivation, the German Government has, according to reports, accorded fair treatment to the 1,491 American civilians (788 men and 703 women) who had been listed as interned at the end of the first year of war with this country.[24] Many of them have already been repatriated, another contingent arriving from Lisbon on the *Gripsholm* about the middle of March, 1944.[25] Some of these civilians complained of food shortages and of cold during their detention at Baden Baden,[26] but they did not report any such inhumane treatment as the Germans are charged with having accorded their civilian enemies of certain other nationalities. Organization of camps included the choice by the internees of a camp spokesman, who represents them in relations with the German authorities, the protecting Power and the organizations concerned with relief; there is opportunity for a limited amount of correspondence, as well as for study, sports, and religious worship.[27]

[23] See J. W. Garner, International Law and the World War (1920), Vol. II, pp. 183–4.

One review of the situation with respect to the use of prisoners of war as laborers in the captor state offers a conclusion which might apply also to the use of civilian laborers: "Apart from isolated instances of exasperation due to the bitterness of the struggle, there would seem to be less evidence today of hatred and a desire for reprisals than of the determination to extract the greatest advantage from prisoners by fitting them as efficiently as possible into the economic machine of the belligerent countries." "The Condition of Employment of Prisoners of War," International Labor Review, Vol. XLVII (1943), pp. 169–196, at p. 193.

[24] New York Times, Jan. 5, 1943, p. 5.

[25] On its East-bound voyage the *Gripsholm* carried "18 members of the former French diplomatic and consular establishments in the United States, 26 German consular officers with their wives and families who came into custody of the United States during military operations in North Africa, a German consular officer and wife taken in Italy, and several hundred German nationals who entered the United States in 1942 from certain of the other American republics en route to Germany but who were unable to continue their voyage at that time." Also on board were about 375 German nationals to be repatriated on humanitarian grounds (involving illness or other circumstances). On the return trip the vessel brought to the United States the staff of the former American Embassy at Vichy and of consular offices in France, together with certain newspaper correspondents and relief workers, and some persons repatriated on humanitarian grounds. Department of State Bulletin, Feb. 19, 1944, p. 189. The final list included more than one hundred nationals of other American republics. Same, March 11, 1944, p. 238. For later exchange see same, pp. 511, 535.

[26] New York Times, Feb. 26, 1944, p. 3.

[27] "Studies and Sports in German Prison Camps," Prisoners of War Bulletin, Vol. 1, No. 4 (1943), p. 1; Russell C. Singleton, "Civilian Internment Camps in Germany," same, Vol. 2, No. 1 (1944), pp. 2, 10.

In view of food rationing and of the importance to internees of incoming mail, an important fact relating to practice in the present war is that, as of April, 1944, seven ships (not including the *Gripsholm*) were making regular trips between the United States and Europe with cargoes consisting entirely of Red Cross material and mail for prisoners of war and interned civilians. Each ship, with a representative of the International Committee of the Red Cross on board, and with a neutral crew, proceeds under safe-conduct from the belligerents, follows a prescribed route, and announces its position by radio at stated times each day.[28]

It remains to consider the treatment which the United States has accorded civilian alien enemies within its jurisdiction. The number of those actually interned has not been very great.[29] Administration of the internment camps has been the subject of comment elsewhere.[30] Perhaps the feature of American policy which has given rise to more questions than any other has been the removal from the Pacific Coast area of more than a hundred thousand persons of Japanese ancestry, approximately one-third of whom were not born in the United States and hence are not American citizens. Hearings on the subject before a Senate subcommittee have afforded opportunity for discussion of the status and treatment of the "relocated" individuals. The Director of the War Relocation Authority has emphasized that the ten centers are not and were never intended to be internment camps, "concentration" camps, or places of confinement in the sense of prisons. Rather, they had for their purpose (1) to provide communities where evacuees might live and contribute through work to their own support, pending their gradual reabsorption into private employment and normal American life, (2) to serve as wartime homes for those unwilling or unfit to relocate from potential combat zones into ordinary American communities.[31]

[28] "The Red Cross Fleet," Prisoners of War Bulletin, Vol. 2, No. 4 (Apr., 1944), p. 1. In addition to the ships in the trans-Atlantic service, there are also certain "shuttle ships" which operate between Lisbon and Marseilles, for the purpose of carrying mail and supplies.

[29] A Department of Justice press release of August 1, 1943, revealed that of the persons who had been before Alien Enemy Hearing Boards, 4,120 (including 1,891 Germans and 2,020 Japanese) had been interned. In a statement on Nov. 14, 1943, Assistant Secretary of State Long mentioned 3,174 as the number of aliens then interned. (Hearings cited in note 31, below Pt. 4, p. 228.)

In April, 1944, Admiral Nimitz was reported as saying that since the war began, 1,396 Japanese had been interned in Hawaii, and that 41 were interned in March of this year. New York Times, Apr. 12, 1944, p. 9.

[30] First article referred to in note 1, above, at p. 43.

[31] Relocation of Japanese Americans (publication of the War Relocation Authority, 1943), p. 2. See also War Relocation Centers, Hearings before the Subcommittee of the Senate Committee on Military Affairs, 78th Cong., 1st Sess., on S. 444, especially Pt. 1 (hearings of Jan. 20, 27, and 28, 1943), pp. 45, 59–60 (statement of Mr. Gufler of the Department of State), Pt. 2 (hearings of Feb. 11, 1943), p. 146 (statement of Mr. Myer), Pt. 4 (hearings of Nov. 24, 1943), pp. 247, 254 (statements of General Hayes). The records referred to are hereafter cited as Hearings.

At a meeting in Brooklyn in April, 1944, Mr. Harold S. Fistere, Supervisor of the War

"Internment" proper is left to the Department of Justice, with whose Alien Enemy Control Unit the War Relocation Authority coöperates in the case of enemy aliens who require such close custody. The merely "relocated" persons (the number of whom had decreased to approximately 88,000 by November, 1943, by reason of the release from camps of some 24,000—some to return to Japan on exchanges, some Nisei to go into the American Army, and still others to go on leave for farm labor or other purposes) [32] are in a distinct category. Their mail is not censored (except that which goes out of the United States). They have religious freedom in camps,[33] and representatives of Spain, Japan's protecting Power, have opportunity to visit them. The Provost Marshal General's Office has taken the position that under the agreement with Japan, which incorporates for the benefit of civilian alien enemies the principles of the Prisoners of War Convention of 1929, the regular civilian food rationing should not be applied.[34]

From two of the relocation centers there have been reports of difficulties of some seriousness. Incidents at Manzanar, California, on December 6, 1942, led to substitution of non-Japanese in camp posts which evacuees had previously filled.[35] The center at Tule Lake, California, has, since September, 1943, been designated as a segregation camp for "relocated" persons coming within four major categories considered potentially dangerous to the security of the United States.[36] Following disturbances at this camp early

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Relocation Authority in the Middle Atlantic district, referred to his agency's problem of caring for 75,000 loyal Japanese in nine relocation centers. He said that the Government did not intend to keep behind barbed wire persons not charged with any crime, but sought to let them have normal lives. He mentioned 20,000 as the number resettled in the Middle West and in the East in the preceding fifteen months. New York Times, Apr. 27, 1944, pp. 1, 4.

[32] Statement of Director Myer, in Hearings, Pt. 4, p. 256.

For a suggestion, from a member of the Senate subcommittee, that Japan desired to receive, through exchange, those individuals who had been listed as loyal to the United States, perhaps in order to punish them, see Hearings, Pt. 3 (March 6, 1943), p. 166.

[33] A recent report of the Special Committee on Un-American Activities, 78th Cong., 1st Sess., on H. Rep. 282, suggests that the practice of Shintoism in relocation centers "is treason *per se*" (App., Pt. VIII, sec. 2, p. 210). Ambassador Grew, however, in a statement before the Senate subcommittee, said that Shintoism was "not necessarily a cult which would interfere with our Government or country. . . . A perfectly loyal American-Japanese might have his little Shinto shrine in the house, might bow before it and burn incense before it every day, which is as much as to say he wants to keep in touch with the members of his family who have gone before." (Hearings, Pt. 1, p. 113.) For the purpose of passing upon the point of whether Americanism and the practice of Shintoism are reconcilable, it seems necessary to distinguish between State Shinto and Sectarian Shinto. On this distinction, see D. C. Holtom, Modern Japan and Shinto Nationalism (1943), pp. 34 and following.

[34] Hearings, Pt. 2, p. 155 (statement of Mr. Barrows, Executive Officer of the War Relocation Authority).

[35] Quarterly Report, War Relocation Authority, October 1 to December 31, 1942, pp. 49–50.

[36] These include "(1) those persons who requested repatriation or expatriation to Japan, (2) citizens who refused during registration to state unqualified allegiance to the United

in November, 1943, Army authorities assumed the administration until normal conditions should be restored and the War Relocation Authority could resume direction. In conversations which some of the evacuees at Tule Lake had with the Director of the Authority, in the course of the events between November 1 and 4, one of the evacuees, admittedly not loyal to the United States, insistently raised the question of the status of Japanese in the camp under international law.[37] Propaganda agencies in Japan are reported to have broadcast that the trouble at Tule Lake arose because Japanese nationals there were ill-treated on account of their loyalty to Japan and because they protested against involuntary labor,[38] statements apparently not supported by the evidence.

The United States Government has notified to the enemy its rigid adherence to accepted rules. In a telegram of January 27, 1944, transmitted to Tokyo through the agency of the Swiss Government, Mr. Secretary Hull said, in part, that ". . . all the camps, stations, and centers where Japanese nationals are held by the United States have been repeatedly visited and fully inspected by representatives of Spain and Sweden who have spoken at length without witnesses with the inmates, and International Red Cross representatives have been and are being allowed freely to visit the camps in the United States and Hawaii where Japanese nationals are held." [39] He also made it clear that ". . . American authorities have . . . freely and willingly accepted from the representatives of the protecting Powers and the International Red Cross Committee suggestions for the improvement of conditions under which Japanese nationals live in American camps and centers and have given effect to many of these suggestions, most of which, in view of the high standards normally maintained, are directed toward the obtaining of extraordinary benefits and privileges of a recreational, educational or spiritual nature." [40]

As has been indicated,[41] the national government agency concerned desires

States and aliens who refused to agree to abide by the laws of the United States, (3) those with intelligence records or other records indicating that they might endanger the national security or interfere with the war effort, (4) close relatives of persons in the above three groups who expressed a preference to remain with the segregants rather than disrupt family ties." (Statement of Director Myer, as of November 14, 1943. Hearings, Pt. 4, p. 214.)

The question which is submitted to American citizens who are "relocated" is as follows: "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any and all attacks from foreign or domestic sources and foreswear any form of allegiance or obedience to the Japanese Empire or any other foreign government, power, or organization?" (Hearings, Pt. 4, p. 226.)

[37] Hearings, Pt. 4, p. 207.

[38] Same, p. 281. When broadcasting that the Japanese were sending to the United States an indication of willingness to have a Japanese ship go to Vladivostok to pick up supplies for American prisoners of war and internees in the Far East, the Tokyo radio announced that the Japanese were protesting against certain treatment which the United States had accorded to Japanese nationals. New York Times, May 9, 1944, p. 10.

[39] Department of State Bulletin, Feb. 12, 1944, p. 171.

[40] Same, p. 170.

[41] Note 31, above.

to carry out the relocation experiment in the interest of the individuals involved, as well as that of the country. That placing of those who have been in the centers will not always be easy, is suggested by the unfavorable reaction recently met with when there were plans to send some of the Japanese-Americans to certain parts of the Eastern United States.[42] Intensity of wartime feeling may cause the final solution of the problem to be delayed for a considerable period. In the meantime, the Constitutional aspects of the measures taken are to receive attention, as the Supreme Court agreed on May 8 to hear argument for issuance of a writ of *habeas corpus* on behalf of an American-born Japanese woman who seeks to secure release from one of the War Relocation Camps in California.[43]

Duality of citizenship of the relocated Nisei has figured as one of the principal legal problems relating to them. In its opinion in the case of *Hirabayashi* v. *United States*, decided June 21, 1943, the Supreme Court noted that children born in the United States of alien Japanese parents, especially those children born before December 1, 1924, are "under many circumstances deemed, by Japanese law, to be citizens of Japan.[44] Some months earlier, commenting on Japanese law pertinent to the subject matter, Mr. Ambassador Grew said that ". . . it would appear that a person of Japanese parentage born in the United States is regarded as a Japanese subject only if he has been declared a Japanese subject by his parents within 14 days of his birth." The Department of State had been informed, he pointed out, that the separate provision of Japanese law concerning liability for military service was not applicable to the first-mentioned provision.[45] It is obvious that no one should be allowed to benefit in war time through a claim to the citizenship of two opposing belligerents, especially when there is ample opportunity for him to choose between them.[46] The law of the United

[42] New York Times, April 27, 1944, pp. 2, 4. Following the reported protest of Mayor LaGuardia there was a move, on the part of an unofficial, inter-racial committee to provide a hostel for Japanese-Americans in the Brooklyn Heights section.

[43] New York Times, May 9, 1944, p. 17.

[44] 320 U. S. 81, 97. The Court referred to the statement in E. G. Mears, Resident Orientals on the American Pacific Coast (1927), pp. 107–8, 429, and to an estimate by the Japanese Consul General in San Francisco in 1927 that 51,000 out of approximately 63,000 Nisei in the Western United States at that time held Japanese citizenship.

[45] Hearings, Pt. 1, p. 116.

[46] The problem of relocation in general is complicated by reason of the great difficulty which there would be in separating Nisei from Japanese nationals, since this would mean dividing some families. Sensitiveness of the United States Supreme Court to the importance and delicacy of the issues involved is suggested in the tribunal's holding that ". . . in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry," while in the same opinion observing that ". . . distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." 320 U. S. at p. 100. Mr. Justice Douglas, concurring, said, as President Roosevelt had said in a letter to Mr. Secretary Stimson under date of February 1, 1943 (Hearings, Pt. 2, p. 158), that Americanism is a matter of the mind and heart, and not of race.

States concerning expatriation is very liberal,[47] and, although a lower Federal court has held that the Government may in periods of distress decline to permit resignation of the obligations of citizenship,[48] the prior provision, which denied the right of expatriation when the country was at war, is no longer a part of the American statutes. On the other hand, under present circumstances there would seem to be no possibility of actually effecting expatriation from American nationality in favor of Japanese nationality, so long as the individual remains within the jurisdiction of the United States.

Recent evidences seem to support the conclusion that the distinction between combatants and civilian non-combatants has not disappeared, that disregard of humanitarian principles in the treatment of the latter has deservedly called forth strong protests from the United States and other states of the United Nations, and that the Government of this country has continued to adhere to rules established through international agreements.

[47] 8 U.S.C.A., sec. 800.

[48] *Petition of Peterson*, 33 F. Supp. 615 (1940). This case came up before the Nationality Act of 1940 went into effect, and while the statutory bar to expatriation, at times when the United States was at war, was still in effect.

THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By JAN HOSTIE *

Opinions differ widely as to the part which an international court of justice should play in world organization.

Individuals and governments for whom the pursuit of certain national or international aims which are not susceptible of immediate achievement transcends the need for law and order will be inclined to conceive the role of such a court as more restricted, more subordinate, than those who believe that, in the long run, the interests of the mightiest and most dynamic nations and the most ambitious ideals of social betterment on a world-wide scale will best be served by first securing such measure of orderly world government as is today within our reach.

Again, some will believe that a certain division of functions is of the essence of good government in world organization as elsewhere; that the capacity of a court as an organ of government is limited to determining rather than perfecting the law; that, outside of certain narrow limits, the function of law making cannot be left to an international court without imperiling its prestige and usefulness; that war as an instrument of change cannot be adequately replaced except by political organs embodying the prevailing power of world opinion, or the prevailing power of armed might, or both; further, that major decisions in international affairs cannot be divorced from their enforcement, which mainly rests with the Big Powers. Those holding these opinions, in all or in part, tend to look upon an international court of justice either as an auxiliary, a technically legal, as opposed to a political, organ of world organization, or, at best, as a tender sapling to be protected in its early growth. Others are of the opinion that a court of international justice can and must be the paramount organ of effective world government. They point out that this approach is along the line of least resistance, for the reason that majority rule is firmly established in the practice of international arbitration and adjudication, and only there; also because arbitral decisions have been carried out by the parties almost invariably and those of the Permanent Court of International Justice without any exception, which

* The following paper was composed by Dr. Hostie as a report to the Institute on World Organization, Washington, D. C. It was based on a preliminary draft made by Mr. Hugh McKinnon Wood, coincides with the consensus of the committee, and takes into account views expressed by other members of the committee, including Dr. Ricardo Alfaro, Professor Hans Kelsen, Professor Ellery C. Stowell, and two members who felt compelled to remain anonymous because of their official positions. No one of the members is responsible for any specific item in the paper; Professor Kelsen disagrees with the distinction between justiciable and non-justiciable disputes and appointment of the judges by governments, directly or indirectly.

is far from being the case of other international decisions; they further remark that, historically, courts with compulsory jurisdiction preceded law-making organs as well as the abolition of self-help, and that codification came only as the result of centuries of development by case law; they point to the experience of the past twenty-five years as tending to confirm the conclusion that it was a mistake to take as the keystone of the League of Nations a political Council rather than a court of international justice.

It is not the object of this report to discuss these conflicting points of view but any revision of the Statute of the Permanent Court of International Justice raises, at the outset, the question of whether that Statute should, in substance, be maintained as it is or be incorporated into the future constitution of a modified League or new Union of Nations. *Prima facie*, the latter would appear preferable to those who consider that a court of international justice should be the keystone of such a League or Union. Partaking of the permanent character of the Statute and of the Court, the revised Covenant would create among all its Members, but among its Members only, the double link of compulsory jurisdiction of the Court over all disputes—at least over all those which the Court itself may find justiciable—and of a collective pledge to carry out all measures ordered by the Council for the enforcement of the Court's decisions.

While more than one member of the Committee would advocate such complete integration if the state of world affairs at the end of this war were still to be what it was in 1919, the majority is of opinion that, things being as they are now, such a course would be inadvisable.

The Statute of the Permanent Court of International Justice, prepared by a committee of jurists of international repute, was inserted by the First Assembly of the League of Nations as an Annex to a Protocol of Signature of December 16, 1920, which was in time signed by fifty-nine States and ratified by fifty-one of them. This original Statute was drawn up with great care. It has already undergone one revision and, on the whole, it was operating to the general satisfaction when the present war broke out. It is the foundation of a vast edifice of international commitments, some of which are, as is the Statute itself, of a permanent character. It would seem unwise to throw all this into the melting pot.

There is a natural and widespread tendency to believe that, in a "new world," new institutions will be needed. In matters concerning the judiciary it is of particular importance to guard against the dangers inherent in such a tendency. Continuity is of the essence of law and order among nations. World organization stands to lose more through lack of continuity in the judicial sphere than anywhere else. The Permanent Court of International Justice should, therefore, be maintained, subject to such changes as the revision of the Covenant of the League of Nations (or the substitution for it of a new Covenant or Constitution of a Union of a similar world-wide and general character) may demand, and to some further

changes, of a relatively minor character, which experience may suggest. The advisability of amendments of the second category, such as those which are suggested in this report, is based on the assumption that some changes of the first category will unavoidably be required. No change appears desirable that would hamper or delay the resumption of the normal functioning of the Court.

Neither the Protocol of Signature nor the Court's Statute were intended as instruments the fate of which might be affected by war; nor do they create any obligation which could be suspended by war. The precedent of the Hague Conventions on Pacific Settlement, which continued in force during and after the first World War without any specific act of revival, confirms the conclusion that the Protocol of Signature, together with the Statute, are and will remain in force after this war unless modified with the consent of all States which are Parties to it.

A. Organization of the Court

1. Its Relation to the League, or Union, and to Non-Member States

The Court was intended as a world court, i.e., a court whose services would be at the disposal of all states. Ideally, such a court should be maintained by the whole community of states. If, as was hoped, the League of Nations had succeeded in becoming universal, this would, in effect, have been the case. Actually the League maintained the Court for the benefit of all states and not merely of its own Members, and there have grown up between the Court and non-Member states a variety of relationships.

1) The Protocol of Signature of the Statute is open to signature and ratification by the states mentioned in the Annex to the Covenant and by such further states as may be admitted later as Members of the League. Two of the states mentioned in the Annex to the Covenant—the United States and Hedjaz—did not become Members of the League. The Protocol of Signature is open to such states and was signed by the United States. In addition, a Protocol was drawn up (September 14, 1929) to enable the United States to adhere to the Court on special terms, including the faculty to withdraw such adherence at any time. Adherence, however, has, so far, failed of approval in the United States Senate and the protocols have not been ratified by the United States. The Court is unconditionally open to these states as it is to League Members.

2) States not mentioned in the Annex to the Covenant cannot become Parties to the Protocol of Signature and the Statute and are thus excluded from the possibility of accepting the obligatory jurisdiction of the Court under the Optional Clause of Article 36, ¶ 2 of the Statute unless and until they have been admitted to membership in the League. This result was intended: the adherence of the defeated Powers to the Optional Clause was not desired in 1920; but it does not promote the purpose for which the Court was founded. The Court is open to such states on condition that they sign a

declaration accepting obligations corresponding to those resting upon League Members (Statute Article 35, ¶ 2 and Council Resolution May 17, 1922).

3) States that cease to be Members of the League after they have ratified the Protocol of Signature continue to be parties to that instrument. The revised Statute entitles such states to participate in the election of judges. Brazil, Germany and Japan were temporarily granted the privilege of taking part in the vote of the Council as well as of the Assembly. The aforementioned protocol of 1929 would grant the same privilege to the United States. States which have ceased to be Members of the League and are not among those mentioned in the Annex of the Covenant have access to the Court under the same conditions as those dealt with under 2).

4) Under Article 35, ¶ 3 a contribution towards the expenses of the Court is required from non-Member states whenever they are a party to a dispute, unless they are already bearing a share of the expenses of the Court.

5) The administration and finance of the Court are entirely in the hands of the League and of the Court itself.

6) In 1929, when the protocol revising the Statute was drawn up, it was considered necessary that this protocol should be adopted by a conference of the parties to the Protocol of Signature and also by the Assembly since the League Members which were not parties to the Protocol of Signature, and the League as an institution, were entitled to a voice in the amendment of the Constitution of a League institution.

The tangle of relationships described above should be clarified.

The Court's connection with the League of Nations, though it caused or contributed to its rejection by the United States, greatly promoted its successful operation, not merely by putting it on a satisfactory financial basis and providing an administrative framework into which it could fit, but also by giving the governments of the League Members, and progressive opinion throughout the world, an interest in the Court and a desire to contribute to its success. This would not have existed to anything like the same extent if the Court had been, like the Permanent Court of Arbitration, an isolated institution the management of whose affairs was entrusted to the diplomatic representatives of the contracting parties in some capital city. It is healthy and natural that a world court should be incorporated in whatever universal system of political organization it is sought to create for the community of states and its success be thus made one of the objects of the organization. This is the best way of securing publicity and healthy criticism for its work and of enabling defects in its structure to be corrected by timely action of the governments. Whether the League of Nations be restored to full activity after the war or a new Union of Nations of a general and universal character be created in succession to it, the Court should remain a League or Union institution. If, at the outset, the League or Union should not include all states, the governing consideration in deciding what is to be the relationship

of non-Member states to the Court should be that the Court exists to promote universal judicial settlement of international disputes, and not merely as a part of the organization. Extension of and submission to international justice is a paramount aspiration and necessity of the world community. Arrangements which make non-Member states feel that the Court does not belong to them, defeat this purpose and should be avoided.

It would, therefore, be desirable:

(a) to open the Protocol of Signature, and thereby the Optional Clause, to signature and ratification by all states, subject, perhaps, to a right of exclusion to be exercised by the Assembly, if this should be considered as politically necessary. In that case a qualified majority might be required here (perhaps the same as for amendments to the Statute should unanimity cease to be required in that respect). It should be pointed out, in this connection, that, under the aforementioned resolution of the Council of May 17, 1922, it is for the Court to decide all questions as to the validity of a declaration made, under Article 35, ¶ 2 of the Statute, by a state which desires access to the Court, that such declaration could be general and that it could be accompanied by acceptance of the jurisdiction of the Court as compulsory, with this limitation, however, that such acceptance may not, without special convention, be relied upon *vis-à-vis* Members of the League or states mentioned in the Annex to the Covenant. Thus questions of recognition of states to which such declaration might give rise were left to the Court to decide.

(b) to give non-Member parties to the Protocol of Signature the right to take part, on the same footing as Members, not merely in the election of judges, but also in all discussions and votes of the League, or Union, which relate to the administration and finance of the Court or to proposals affecting the Statute.

(c) to impose on such non-Member parties the obligation of paying to the League, or Union, an annual contribution equal to the share of the Court's budget which they would have borne if they had been Members.

In the event of the dissolution of the League without simultaneous creation of a new world organization for general purposes, the Court would have to be maintained by the parties to the Protocol of Signature through some form of special organization such as exists for the Permanent Court of Arbitration or such as is provided for in the unratified League Convention of November 16, 1937, for the creation of an International Criminal Court.[1]

2. Election of the Judges

Like administration and finance, and for the same reason, the election of the judges of a world court is a function which must belong to the commu-

[1] See the text of this convention and the related convention on the repression of terrorism in the League of Nations publication "Proceedings of the International Conference on the Repression of Terrorism." League of Nations, Publications, 1938, V. 3.

nity of states, i.e., to the governments, if the court is to be acceptable to all the states. Furthermore, it is desirable that the function should be exercised, not through some *ad hoc* assembly of delegates, but through a body like the Assembly of the League of Nations, which as the organ of a world association of states has developed a sense of collective responsibility, and in which the delegates are accustomed to working together and are likely to have greater freedom of action, and often greater authority with their governments, than delegates to a special electoral conference.

If this be so the present system is sound in principle. Certain questions may be raised regarding it.

The first is whether any changes can be suggested which would increase the probability of good appointments being made. To ask this question does not in any way imply that the standard of appointments has been low. On the contrary it has on the whole been remarkably good; but the court elected in 1930 was felt by some to be a weaker tribunal than that elected in 1920, and no effort should be spared to secure judges whose character and ability commands universal confidence.

It would seem, however, that there is nothing to be accomplished from this point of view by tinkering with the Statute. The qualifications which it requires in candidates could be made more precise or more severe, but there is no way of eliminating persons who do not satisfy these requirements except through the votes of the governments. A high standard of appointments must, therefore, result a) from the majority of the governments being determined to create a strong Court and b) from service on the Court being attractive to men of high calibre. These conditions are likely to prevail in increasing measure as the Court prospers and its importance and activity increase.

Two reasons, moreover, make it difficult to exact a particular standard of qualifications in all the judges. The first lies in the provision of the Statute—a provision indispensable for a world court—that the judges shall all be of different nationalities and the Court as a whole represent "the main forms of civilization and the principal legal systems of the world" (Art. 9). This means that to some extent weaker candidates must be preferred to stronger on the ground of the civilization or the legal system which they represent. Secondly, if one considers what qualities should be united to form the ideal international judge, such as knowledge of both the official languages of the Court; adequate acquaintance with and a common sense outlook upon the real facts of international relations; arbitral experience, or, at least, practical experience, preferably judicial, in the administration of law and, above all, special proficiency in international law as well as knowledge of the general principles, at least, of more than one national law system, one can hardly expect to find them united in each one of a sufficient number of candidates and must be contented if they exist in the Court as a whole.

The question next in importance is whether the system of election for a

given term (nine years) ought to be maintained or whether judges should be appointed for life. Opinions in the Committee are divided on this question. The majority favors the maintenance of the present term; two of the members would prefer to see the judges appointed for their lifetime as they see in this a strengthening of the independence of the Court and a change which seems both feasible and opportune.

All are, however, in agreement as to the desirability of an age limit. If the system of the appointment for a term of nine years is maintained, it is suggested that no person should be eligible after 66 years; if the appointment for a lifetime is preferred, compulsory retirement at 75 years might be provided.

In the first alternative it is suggested that, instead of all the judges retiring every nine years, one third should retire every three years in order (a) to make the Court more responsive to changes in the times, (b) to avoid the situation of 1939 when the third general election had to be postponed, and (c) to ensure continuity in the membership of the Court. It is pointed out that a system of retirement in rotation already exists for the Council of the League.

The question has been considered whether the rather cumbersome machinery of the elections could be simplified by eliminating the nomination of candidates by national groups and the participation in the elections of the Council, or whatever body of the same general nature may be substituted for it.

As to the question of the national groups the Committee is of opinion that the system of presentation by such groups is preferable to direct nominations by governments. The present device may not have fully achieved what was intended, namely restricting the electors to candidates nominated by independent and well qualified persons; it has, however, been far from useless in that respect. One of the members, while maintaining the system of nomination by national groups, has suggested some changes in its modalities; the other members are in favor of the existing system. In the opinion of the latter this is one reason, among others, which renders the maintenance of the Permanent Court of Arbitration desirable, if not necessary.

In any system of world organization that may be adopted it is likely that there will be, in addition to an Assembly, a body of the same general nature as the Council of the League of Nations. The participation of the Council in the election was the device by which the Committee of Jurists who drew up the first draft of the Statute reconciled the demand of the Great Powers for permanent representation on the Court with the demand of the other Powers for equality of status. It seems not to have been necessary for this purpose. At each of the two general elections which have occurred the candidates of the Great Powers have been elected by both the Council and the Assembly at the first ballot, and there is every reason to suppose that they would be elected with equal facility if the Council ceased to elect, since

the desirability of the representation of these Powers on the Court in the interest of the success of the institution is generally recognized. This inference from past practice is strengthened by the fact that, from 1926 onward, the number of non-permanent members of the Council was raised to six, later to nine and, finally to eleven. Several members of the Committee are of opinion that, on the basis of this experience, there seems to be every reason for simplifying the procedure by entrusting the election of the judges to the Assembly alone. One member, however, thinks that this might give an undue influence to smaller States. Should this view prevail, at least temporarily, then it would probably be wiser to be content with the existing arrangement while perhaps providing in the amendment clause (see below) a method whereby the mode of election, as well as other matters concerning the organization of the Court and its procedure, could more easily be modified than is at present the case.

3. The Size of the Court

The revised Statute fixed the number of the judges at fifteen, instead of the original number of eleven, with four deputy judges. (There are no longer any deputy judges.) It requires the full Court to sit, except as otherwise provided, but the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, to be excused from sitting. The previous quorum of nine judges has been maintained.

As regards the number of judges, one member of the Committee has suggested that it be increased to seventeen; the others are in favor of the *status quo* in this respect. As to the number of judges actually sitting in a given case, the suggestion has been made [2] that it should be limited to eleven, not counting any judges *ad hoc*. It seems preferable to leave the matter, as at present, to the Rules of Court and to the practice of the Court under these rules.

4. Privileges and Immunities

Article 19 is clearly deficient. One of the members of the Committee has suggested the following text: "The members of the Court shall enjoy the privileges of extraterritoriality in all the states Members of the League; their citizenship and allegiance to their home state is suspended during their function as members of the Court. The document certifying their membership in the Court shall be recognized as diplomatic passport by all the states of the League."

Without going into the details of this vast matter, which could only be dealt with adequately in a special study, it may be pointed out that, in addition to the position of the members of the Court, the status of its personnel and of its premises, including the residence of its members and of its per-

[2] Commission to Study the Organization of Peace, Annex I D 4 to the Preliminary Report of March, 1941; International Conciliation No. 369, p. 346, point 3.

sonnel, should be considered, both from the negative point of view (absence of interference, infringement, etc.) and from the positive one: maintenance of order, contempt of court, etc. The question of the legal vacuum which is created, both as to the law applicable in both private and criminal matters and as to jurisdiction over the members of the Court itself and over its personnel, is one of extreme delicacy; for example, should the Court be given jurisdiction to try one of its members who might be accused of manslaughter and, if so, according to what law? Or should it be left to the Court to waive the immunity of one of its members and, if so, is that an adequate solution to the difficulty? These and similar questions unavoidably arise as soon as one attempts to design an adequate status for any international organization; obviously, however, guaranties, analogous but not similar to those which, in international custom, protect diplomatic agents, their personnel and their premises, must be particularly strong where the independence of the international judiciary is at stake. It may even be considered that suspension of allegiance during the time that the international judge is in active service is insufficient and that he should be protected for the duration of his lifetime.

5. Special Chambers—The Chamber of Summary Procedure

Although the Chamber of Summary Procedure has only dealt, down to the present, with two cases, both between the same two parties and related to the same subject matter, it seems clear that this Chamber should be maintained. It is incompetent to give Advisory Opinions, but it can always be resorted to by the parties to a suit if they agree to do so. No changes as to this Chamber are suggested.

6. Special Chamber for Communications and Transit

The suppression of this Chamber, which has never been used, is suggested by the Committee. It was already advocated, at the time of the revision of the Statute, by the Organization for Communications and Transit of the League of Nations.[3]

7. Special Chamber for Labor Cases

This Chamber also has never been used. Its suppression is, however, not advocated. One member of the Committee, specially competent in labor matters, has convincingly pointed out that a useful future for this Chamber can still be conceived and that nothing would be lost by leaving matters here as they stand. He has further pointed out that, while, in matters of communications and transit, the full Court is assisted by technical assessors only when desired by the parties or decided by the Court (which has never been the case), in labor cases the full Court must always be assisted by such assessors. It is because all cases dealt with so far have been handled under

[3] League of Nations, Publications, 1929, VIII 7, pp. 11, 64.

advisory procedure that assessors have not yet sat. While the Organization for Communications and Transit has always contended that the presence of such assessors is at best useless and may actually be detrimental, this same member of the Committee is of opinion that in labor matters the assessors may, in certain cases, have a very useful function to fulfill.

8. Regional Chambers; Special Chamber for Claims on Behalf of Private Persons

The Committee concurs in the views expressed in the following passage by Mr. C. Wilfred Jenks: "The coëxistence of the Permanent Court of International Justice and of entirely independent regional international courts would involve at least two dangers. There would be a danger of conflicts regarding jurisdiction and a danger that regional courts might be inspired by regional legal conceptions to such an extent that their decisions might prejudice the future unity of the law of nations in respect of matters regarding which uniform rules of world-wide validity are desirable." [4]

In 1942 Mr. McKinnon Wood, discussing the question of creating an Inter-American Court, said: "The existence of two courts would hardly be favorable to a uniformly progressive development of international law. If there is sufficient need for a court situated in the Western Hemisphere it might be possible to consider some such arrangement as a division of the present Court into two regional chambers and the establishment of a right of appeal, on points of law only, to the whole Court sitting in full strength to hear such appeals." [5] Similarly, it has been pointed out to one of the members of the Committee by an eminent authority in the field of private international law, that a division of labor within the Court, whereby some of the judges would habitually deal with cases mainly involving questions of public international law and others with those, including most of the claims proferred on behalf of private persons, mainly involving questions of private international law, might be desirable.

The Committee is of opinion that, in order to take such possibilities into account, it would suffice to vest the Court with power to create, as need may arise, additional special chambers with reference either to geographical regions or to subject matter, provided always that cases should be heard by the full Court unless parties agree to demand that the case be heard by one of these special Chambers. It might be left to the Rules of Court to provide for any or all of the following procedures: appeal from a special chamber to the full Court; transfer of a case to the full Court ordered by a special chamber or, in certain defined circumstances, by the full Court itself; reference by the special chamber to the full Court, for decision by the latter, of some special point arising in the course of a case.

[4] C. Wilfred Jenks, "Regionalism in International Judicial Organization," this JOURNAL, Vol. 37 (1943), p. 315.

[5] World Organization, A Symposium of the Institute on World Organization, Washington, American Council on Public Affairs, 1942, p. 305.

9. Judges *ad hoc*

Judges *ad hoc* (Article 31) have proved to be very useful. No change is suggested in this respect.

10. Should the Court Be Considered To Be in Permanent Session?

The revised Statute converted the Court into a tribunal which is technically always in session, except during the judicial vacations, and whose members are required to hold themselves always at its disposal. There is some reason to think that this obligation, which can be interpreted as importing the duty to reside within not more than a certain number of days journey from the seat of the Court, has tended to render membership of the Court less attractive to candidates from countries at a great distance from the seat of the Court. But to abandon the principle of permanence would suggest that the Court was not expected to be fully employed, and the growth of air travel will diminish the difficulty mentioned, if it still exists.

11. The Seat of the Court

Two suggestions may be made:

(a) That the Statute should be amended so as to give the League or its successor power to change the seat, as can be done for the League itself by a decision of the Council under Article 7, ¶ 2, of the Covenant. It seems undesirable on general grounds that such a change should require an amendment of the Statute of the Court. There is no ground, of course, for dissatisfaction with the treatment which the Court has received at the Hague, and none would be implied by the amendment.

(b) That in view of what happened in 1940 the Court itself should be given formal authorization to hold its sessions away from its seat in case of emergency.

One member of the Committee is of opinion that the seat of the Court should be established at the seat of the League. While concurring, in principle, in this opinion, another member believes that the suggestion under (a) made by the Committee would suffice ultimately to achieve this end.

B. Competence of the Court

1. Optional or Compulsory Jurisdiction under the Statute

Should acceptance of the Statute involve submission to the Court's jurisdiction?

The draft of the Advisory Committee of Jurists gave the Court compulsory jurisdiction over certain classes of legal disputes. When the draft came before the Assembly this was found not to be acceptable to the majority of the Governments. The present Optional Clause was substituted for the Committee's system and the question of establishing the Court was thus separated from that of making its jurisdiction compulsory. Progress in the latter direction was left to be accomplished gradually through acceptance of the Optional Clause and conclusion of treaties outside the Statute.

Subsequent events have, it is suggested, demonstrated the wisdom of this decision and, in the opinion of most of the members of the Committee, it would be a mistake to propose amendments of the Statute for the purpose of giving the Court this or that form of compulsory jurisdiction. In order to be utilized the Court must first be accepted and it is important, for this purpose, that its Statute should retain the character of an instrument which can be signed and ratified without incurring any obligation to submit to suit before the Court.

It need hardly be pointed out that this does not preclude permanent commitments either under Article 36, ¶ 2 of the Statute or in virtue of a permanent Covenant or international constitution whereby all the members of a League or Union would bind themselves *inter se*.

2. Suggestions for Extending the Court's Jurisdiction

Many such suggestions are heard today. It is not always clear whether they contemplate amending the Statute to give the Court compulsory jurisdiction, but most of them involve changing Article 34 which provides: "Only States or Members of the League can be parties in cases before the Court."

Appeals from Arbitral Tribunals.

There is much support for the idea that it would improve the machinery of international arbitration to recognize the Court as a court of appeal from arbitral tribunals, more particularly in cases where the tribunal is alleged to have assumed jurisdiction without being entitled to do so or to have exceeded its powers and also possibly in other matters.

This can, to a certain degree, be done by appropriate treaty provisions outside the Statute, since the definition of the cases which states can bring before the Court is sufficiently wide to cover disputes regarding arbitral awards.[6] The Court itself in its revised rules of Court has inserted a section on the subject consisting of one article of which the following paragraphs may be quoted:

> Article 67. 1) When an appeal [7] is made to the Court against a decision given by some other tribunal the proceedings before the Court

[6] Statute, Art. 36: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." Covenant, Art. 14: . . . "The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. . . ."

[7] The Court adopted this expression with some hesitation and on the understanding that it was not to be understood in the technical sense which any particular legal system might give to it. See statements by Judges Fromageot and Rostworowski on p. 343 of the minutes of the Court's discussions of the revision of the Rules of the Court in the year 1935 (Court Publications, Series D, No. 2, Third Addendum: Elaboration of the Rules of the Court of March 11, 1936).

shall be governed by the provisions of the Statute of the Court and of the present Rules.

2) .....

3) The document instituting the appeal shall contain a precise statement of the grounds of the objections to the decision complained of and these constitute the subject of the dispute referred to the Court.

4) .....

5) .....

A clause under which certain appeals have been brought to the Court is found in Article X of the "*Accord (No. II) pour le règlement des questions relatives aux réformes agraires et aux tribunaux arbitraux mixtes*" which was concluded at Paris on April 28, 1930, between Hungary, Rumania, Czechoslovakia, and Yugoslavia.[8] The clause is as follows:

> "*Pour toutes les sentences de compétence ou de fond rendues désormais par les tribunaux arbitraux dans tous les procès autres que ceux visés par l'article premier du present Accord, la Roumanie, la Tchécoslovakie et la Yougoslavie, d'une part, et la Hongrie, d'autre part, conviennent de reconnaître à la Cour permanente de Justice internationale, sans qu'il y ait besoin de compromis spécial, compétence comme instance d'appel.*
>
> "*Le droit d'appel pourra être exercé par voie de requête par chacun des deux gouvernements entre lesquels se trouve constitué le tribunal arbitral mixte, dans un delai de trois mois à dater de la sentence dudit tribunal.*"

In 1928–1931 the League of Nations investigated the question of giving the Court jurisdiction in appeals from arbitral tribunals. In the latter year various proposals, including a draft protocol open to all states, were before the First (Legal) Committee of the Assembly, but the subject was ultimately adjourned *sine die*.

It would seem to be a timely development, in the spirit of the Hague Conferences of 1899 and 1907, to provide in a revised Statute, that, subject to the special provisions contained in treaties in force, whenever an arbitral tribunal is alleged to have assumed jurisdiction without being entitled to do so or to have exceeded its powers, an appeal may be brought to the Permanent Court of International Justice within a period of time to be specified. This would do away with the danger of rejection of an arbitral award as null and void and thus strengthen international arbitration without impairing the freedom of states to peacefully settle international disputes in the way which seems to them most appropriate.

In connection with this question two members of the Committee have suggested that it would not be a negligible contribution to the development of international law if, in future, some instrument, perhaps the revised Covenant, or the Constitution of a new Union of Nations, provided for registration and publication of all decisions rendered by arbitral tribunals.

[8] Court Publications, Series D, No. 6; *Collection des textes régissant la compétence de la Cour*, p. 620.

Proceedings in which not all the Parties are States, or Members of the League of Nations, or of its Successor.

As, in its opinion, compulsory jurisdiction should not be conferred on the Court under its Statute, the Committee will only be concerned to examine whether any suggestions falling under the above heading are of a nature to make it desirable to alter Article 34. Such an alteration would have two effects. It would enable cases of the kind considered to be brought before the Court by agreement between the parties. It would also open the way to general agreements giving the Court compulsory jurisdiction.

Two types of suggestions may be distinguished: (i) Opening the Court to proceedings by and against individuals and corporations; (ii) Opening the Court to proceedings by and against certain unions of states.

i) Proceedings by and against individuals and corporations.

The mere existence of the Court has tempted some generous-minded internationalists to suppose that an extension of its jurisdiction *ratione personae* to individual human beings and artificial legal persons of national law is all that is necessary to provide legal remedies for various wrongs for which they feel redress cannot at present be obtained by any practicable procedure. Thus Prof. W. G. Rice, Jr., discusses sympathetically several examples of such proposals.[9] He gives his support:

a) To the proposition that the Court should be made competent to adjudicate claims by individuals against foreign states, usually "but not always" after the claimant has exhausted the local remedies. The claimant's own government would have a right to veto the presentation of the claim to the Court, but the defendant state would not be able to refuse to be sued. The expected advantage is the political advantage of stopping states from acting as debt collectors.

b) To the proposition that the Court might act as a tribunal before which states and international institutions would prosecute persons charged with crimes "against the whole world," such as piracy, slave-dealing, illegal trade in narcotics, and even wrongs done to the particular state itself such as the counterfeiting of its currency, stamps or passports.

Mr. Rice also mentions, but discourages, the idea that the Court might act as a court of appeal from national tribunals in cases of alleged denial of a "fundamental right," which deserves universal recognition.

It is quite feasible to give an international court jurisdiction over human beings and artificial legal persons. The defunct Central American Court could entertain suits by individuals against the states which established it and two elaborate conventions which have not come into force have been drafted for the purpose of setting up special world courts competent to hear proceedings in which private persons or corporations would be parties: The Hague draft convention of 1907 for the creation of an International Prize

[9] International Conciliation, as cited, p. 505.

Court and the League of Nations convention of November 6, 1936, for the creation of an International Criminal Court.[10] The first of these tribunals was to hear appeals from national prize courts. The second was to serve the limited purpose of enabling parties to the convention having in their custody a person accused of a terrorist offense against another party, and unwilling to extradite or try the person in their own courts, to send him for trial to an international court; only nationals of parties to the convention were to be treated in this manner.

But the difficulties which stand in the way of using the Permanent Court of International Justice for these, or similar, purposes, as for the purposes mentioned in Mr. Rice's monograph, are so formidable that it would be difficult to justify amending Article 34 of the Statute in order to make this possible. Indeed the present form of the article may be thought a valuable safeguard against attempts to give the Court functions which it could not discharge without danger to the performance of its original and proper function.

The status and operation of the Court would be transformed if, in addition to its existing jurisdiction, it could effectively be given jurisdiction as a tribunal open to private interests for the prosecution of claims against foreign states, as a court of criminal justice trying several species of crime and as a universal court of appeal from national tribunals on issues relating to "fundamental rights" raised by private persons, or as any one of these things. It seems out of the question that any system of electing the judges could produce a court which would seem satisfactory to all the interests throughout the world which the new forms of jurisdiction would affect and to all the sections of public opinion which would be interested in their exercise.

Besides, the vindication of a legitimate private claim may raise questions which it may not be in the national interest, or even in the general interest of the community of states, to have raised in the forum where the rights and duties of states towards each other are judicially determined.

Finally, while the Permanent Court of International Justice may frequently deal with questions of national law, particularly in cases of diplomatic protection, its principal function should remain the determination of public international rights. If the new forms of jurisdiction were a success, they might, however, overshadow the old and the Court become an international civil court and a criminal court which also decided disputes between states. Such a development might react detrimentally on the efficiency and prestige of the Court as the supreme guardian of public international law, quite apart from the fact that the establishment and expenses of the Court would have to be much greater and its structure could hardly remain the same.

[10] See the text of this convention and the related convention on the repression of terrorism in the League of Nations publication Proceedings of the International Conference on the Repression of Terrorism, League of Nations, Publications, 1938, V. 3.

Therefore, insofar as it may be found necessary or desirable to provide for the possibility of proceedings by or against individuals and corporations in international courts (a question which is outside the scope of the present report) the solution would be to have special tribunals such as international criminal courts, international administrative tribunals, international admiralty courts, international claims tribunals, etc., erected for the purpose.

In instituting such courts or tribunals, it might be found desirable, however, to provide,—as one member of the Committee suggested,—for the reference, by such courts or tribunals, of important questions of law, at least of public international law, to the Permanent Court of International Justice. There would seem to be no reason why this should be precluded, provided this Court would remain at liberty to decline the request and provided its ruling, if the request is entertained, were binding upon the court, or tribunal, which requested it.

ii) Proceedings by and against unions of states.

Under unions of states should be understood unions composed of Members of the community of states and any dependencies granted membership in them (e.g. India in the League of Nations and also other dependencies in certain technical unions such as the International Telecommunication Union). Should Article 34 of the Statute, which excludes all unions of states from being parties in cases before the Permanent Court of International Justice be amended? Opinions in the Committee are divided on this question.

Some members have argued that the assimilation to states of "groups of states aggregated into institutions"—as Mr. W. G. Rice puts it—or, in other words, of certain legal persons of public international law other than states or Members of the League of Nations, is a prudent and judicious step forward that should be taken at this stage.

Having particularly in mind international organizations such as the River Commissions, one of these members said:

> "Consider the position that may arise whenever a binding decision of an international body—for example, the adoption, rejection, or amendment of plans for public works or of international rules and regulations—becomes the subject-matter of a dispute, it being alleged by one or several of the states concerned that the decision is in violation of international law. Necessarily to regard the individual members of the body which rendered the decision as the mouth-pieces of their several governments, although the treaty which created that body may regard them *in corpore* as an organ of a world-wide, or regional, community of states, is not only to hamper the future development of international institutions but actually to distort existing institutions in order to make them fit into a frame-work designed for the *plerumque fit*."

In the matter of diplomatic protection, giving a similar *locus standi*, wherever it is found indispensable, to an adequate international agency, is, according to these members, the only way gradually to extend such pro-

tection to persons without nationality, or whose nationality has changed, or to whom their own State denies protection without good reason.

In the vital matter of human freedoms, of a universal Bill of Rights, possibly supplemented by regional, or otherwise limited, agreements, Article 34, in the opinion of these members, would stand in the way of a similar solution which, for the implementation of the freedoms which the Atlantic Charter and other authoritative statements of policy have outlined as part of the aims of the United Nations, might well be preferred, at least as a world-wide solution, to that, more radical, of creating international courts open to private persons where claims might be proferred by citizens against their own state and state officials be tried for injury inflicted on their fellow-citizens.

Those members of the Committee who, for the foregoing reasons, are of opinion that unions of states sufficiently integrated to warrant their being parties in a case before the Court should be assimilated to states for the purpose of Article 34, are further of opinion that, should any doubt or objection arise as to the ability of a given union of states to be a party in a given case, the decision should be left with the Court.

One of these members, while in favor "of allowing associations, unions, institutions, or bodies of an international character to sue and be sued before the Court on any question arising between the association and a state," is of opinion that "the possibility of any one of these international associations or institutions litigating against another of the same character" should be excluded.

Other members of the Committee are of opinion that the arguments against opening the Court to proceedings by and against individuals and corporations, although not applying with the same force to proceedings by and against unions of states, speak for the maintenance of Article 34 at least until the law to be applied is more developed and international organizations have ceased to be what they still are, in most instances: "loosely-knit combinations of governments operating normally . . . under the rule of unanimity for all important decisions."

In the discussion of this problem the question has incidentally been raised of the advisability of a judicial interpretation of the statute (Covenant, Constitution, etc.) of an international organization.

That question, however, is outside the scope of this report. Just as, under the present Statute, adhesion to it implies no commitment as to compulsory jurisdiction, so assimilating international unions of states to states does not, in itself, give the right to any state, member of such a union, to compel the union to be party in a suit tending to the judicial interpretation of any clause of the statute of that union. It will still be for the statute to determine, explicitly or implicitly, whether disputes concerning its interpretation are justiciable and, if so, which disputes, under what conditions, and by what procedure. Further, as in the case of states, a declaration by the

union itself might be made the condition precedent to any suit being brought against it by written application. Such a declaration to be made by the union under Article 36, ¶ 2 could, naturally, be made under reservation of compulsory jurisdiction for the interpretation of all or part of the statute of the union.

3. The Optional Clause

All European Great Powers have accepted compulsory jurisdiction with the exception of the USSR (Italy until 1936; Germany until 1938); so have all other European Powers with the exception of Czechoslovakia and Poland and very few have either made reservations which substantially limit the scope of compulsory jurisdiction (Greece, Albania, Rumania) or have let their declaration lapse without renewal before the outbreak of this war (Yugoslavia, Spain). Although acceptance of compulsory jurisdiction was not so general among American states (no doubt owing to the non-ratification of the United States' adhesion to the Statute of the Court), 13 out of 22 have accepted compulsory jurisdiction. This does not include Argentina, which signed the statute and accepted compulsory jurisdiction in 1935 but, like other states (Turkey, Iraq, and Egypt), failed to ratify, in the presence of the growing deterioration which occurred in the general international situation from that time until war broke out. In Asia, Australia, and Africa, the only Powers which hung back, apart from the USSR, were Japan, Afghanistan, Saudi Arabia and Liberia. In particular the failure of China to renew her declaration in 1927 may safely be attributed to growing impatience with unequal treaties, while Iran's position (similar to that of Greece) does not seem to differ materially from that of the states which made reservations as to disputes arising from situations or facts anterior to ratification. Whether compulsory jurisdiction is generally accepted at the end of this war or not will, in all likelihood, primarily depend on the attitude of the United States and the USSR. On January 1, 1944, compulsory jurisdiction was still in force among 36 states.

Some would prefer a limitative enumeration of permissible reservations, eliminating thereby such reservations as that which, originating with Greece, was taken over by 4 other states (exclusion of territorial questions).

It has already been suggested that the Protocol of Signature and, with it, the Optional Clause, should be open to all states.

The enumeration in Article 36, ¶ 2 has been justly criticized. The choice, however, between such an enumeration, the formula of Article 17 of the General Act of September 26, 1928 (all disputes with regard to which the parties are in conflict as to their respective rights), or the simpler and more flexible formula "all justiciable disputes," or other similar formulas that one may find in treaties and authoritative proposals, does not loom as large today in the minds of international lawyers as it did some years ago. Each of the three solutions mentioned is favored by some members of the Com-

mittee. Those members who suggest the adoption of the formula "all justiciable disputes" in place of the enumeration of "legal disputes," point out that the idea which seems to be implied in Article 36, ¶ 2, that states are not expected to submit in advance to compulsory jurisdiction for all cases which, in virtue of the first paragraph of the same article, are comprised within the potential jurisdiction of the Court, but only for certain categories of disputes, is no longer tenable, if it ever was. In their opinion the scope of the second paragraph should be made coextensive with that of the first, which seems, however, unduly broad. They point out that, as the Court is not an arbitral tribunal, and thus not the creature of the parties, the right for the Court to declare a dispute non-justiciable should be stated expressly, for the Court may, in a given case, deem it imperative to refuse judgment on the basis of a *compromis* the terms of which may be incompatible with its functions as a Court of Justice. They further point out that, as international organization develops, it may well occur that a dispute before the Court is found to be political in character and therefore non-justiciable, not in the sense of Article 17 of the General Act, but in another sense, similar *mutatis mutandis* to that which attaches to the term in national law systems. The Court may find that it cannot decide because, in virtue of a rule of international law, the decision which it is requested to give is within the powers of a political organ of an international organization, such as the Council of the League of Nations, a River Commission, etc., the second paragraph of Article 35 of the Statute of the Court itself being a case in point. In the opinion of these members, it is in that sense only that there is still room for the notion of non-justiciability in a system where the *ultima ratio regis* is eliminated. Nevertheless what is left in the hands of the Court itself may be deemed safe and, in an extreme case, where *summum jus* might appear to that body itself as *summa injuria*, a flexible formula might, perhaps, one day prove its worth.

4. Law to be Applied by the Court

The author of the anonymous monograph referred to above [11] has suggested substituting another flexible formula "law and equity" for another enumeration, that of Article 38, an attempt to define the law to be applied by the Court. Another suggestion, made by a member of the Committee, consists in replacing Article 38 by the following text:

> "The Court shall apply the rules of international law.
>
> "The general principles of law recognized by civilized nations are considered to be part of international law.
>
> "The Court shall decide a case *ex aequo et bono* if the parties agree thereto."

Another member concurs in this suggestion as regards the first two paragraphs. He would prefer to see the third deleted, for very definite reasons.

[11] International Conciliation, as cited, p. 347, item 10.

Even if the present text, which merely gives the Court a power,—a power which the Court, so far, has never been requested to make use of,—is maintained, the presence of a text saying that the Court may decide *ex aequo et bono*, "if the parties agree thereto" opens the door to the contention that, in the absence of such agreement, the Court may not apply equity as part of the law. However mistaken such contention may be it is undeniable that, as long as that paragraph stands, there is some danger of "law" being considered as synonymous with "strict law." If there were some hesitation about leaving to arbitral tribunals all cases where parties agree upon empowering the judges to go outside the law as it stands, then that formula, or a similar one, should, at least, be substituted for the words *ex aequo et bono*. The desirability of an amendment is confirmed when one refers to the *travaux preparatoires*. The third paragraph is not part of the text of the Advisory Legal Committee; it was added by the Sub-Committee of the 3rd Committee of the Assembly, as a result, not of a written amendment, but on the spur of the moment, after only a brief discussion. The record shows that the text was improvised by M. Fromageot with the declared intention of making it clear "that the judgment of the Court should confirm an arrangement reached between the parties," which, in his opinion, contradicted by Sir Cecil Hurst, would otherwise have been impossible.[12] He first suggested adding to Paragraph 3 the words: "and justice," after "the general principles of law," explaining that (in case of an agreed award) this would enable the Court to state as the sole reason for its judgment that the award had seemed to it to be just. He subsequently altered his suggestion to the present text, after Sir Cecil Hurst had said that the Anglo-American system recognized no difference between law and justice, and the chairman, Mr. Hagerup, had pointed out that M. Fromageot's idea belonged rather to the sphere of arbitral jurisdiction and that its application might jeopardize the authority of the Court. If there was nothing involved but what M. Fromageot declared that he had in mind, Sir Cecil was right in thinking that no amendment was required; an arrangement reached between parties is an international convention; the only question, therefore, was whether the Court was obliged to embody in its decision any award of this kind, even one that would run counter to the rights of third parties? That, however, is a general question that may arise in any case where a convention is to be applied, and the amendment, as finally adopted, gives a power to the Court; it does not affect its duty as to the application of the law. Clearly, the addition was, therefore, superfluous at best. As regards the interpretation and application of municipal law by the Court, reference should be made to Mr. C. Wilfrid Jenks' suggestions for amendment of Articles 38, 50, 62 and 63 of the Statute, particularly those concerning procedure.[13]

[12] First Assembly, Minutes of the 3d Committee, p. 385.

[13] British Yearbook of International Law, 1938, pp. 67–103.

C. Procedure

1. Conduct of Litigation

The principles and rules laid down in the Statute and the powers given to the Court by the Statute appear, in substance, to be satisfactory as they stand.

2. Interim Protection of the Rights of Parties

At present, the parties have no legal obligation to carry out what the Statue calls "the measures suggested." This is in sharp contrast with the Convention to Improve the Means of Preventing War of September 26, 1931, which, referring to disputes brought before the Council of the League of Nations, provides for the undertaking (a) to accept and apply the conservatory measures of a non-military nature relating to the substance of the dispute which the Council, acting in accordance with the powers conferred upon it by the Covenant, may recommend with a view to preventing the aggravation of the dispute; (b) to carry out the measures which the Council may prescribe to ensure evacuation of foreign territory, foreign territorial waters or demilitarized zones; and (c) to comply with withdrawals beyond lines fixed, under certain conditions, by the Council. Although this convention has not come into force, it expresses what many states considered as both desirable and feasible already before the present war. It is true that the Council's decisions envisaged in the Convention require unanimity, apart from the parties to the dispute; on the other hand, a political board does not present the guarantees of impartiality offered by the Permanent Court of International Justice. Although it is in the nature of things that the problem under consideration looms larger in the handling of disputes by a Council than by the Court, its proper solution may be extremely important here also. There is no valid reason why the binding force attached by Article 59 of the Statute to the decisions of the Court should not apply to provisional measures if the Court should find that such measures ought to be taken to preserve the respective rights of either party. It can be safely left to the Court to use such power with discretion.

It may be argued that, as things stand, the state concerned has good motives for complying with the Court's suggestions, since not to do so might affect the Court's attitude. If the Court's pronouncement, however, is merely a suggestion then failure to comply with it is not a breach of duty and should not adversely affect the Court's attitude. It may also be argued that, if the action is lost, disregard of the Court's suggestion may involve payment of higher damages, but the prejudice may be of a kind which renders compensation by payment inadequate. Finally, it may be said that prompt action may be of the essence of the situation and that it will be easier for the Court to act with the necessary rapidity if its pronouncement does not amount to a binding decision but retains the character of authori-

tative advice; it is clear, however, that vesting power in the Court to take a binding decision, in case it is found that this is imperatively required, would not preclude the possibility of a mere suggestion in other instances.

3. Dissenting Opinions

The decision to allow the judges to pronounce dissenting opinions, a right of which full use has been made, has been justified by experience. The fear that the Court's authority would be weakened has not been realized. On the other hand, the contribution which the Court can make to the development of international law is certainly increased by the rendering of dissenting opinions.

4. Communication with the Governments

Two systems are in force. All communications and documents intended for Governments not belonging to the League are despatched directly from the Court's registry. On the other hand the Statute (Articles 40 and 65) requires that the general notification to League Members of the commencement of a suit or receipt of a request for an advisory opinion shall be effected through the Secretary General of the League, and it is the practice for the documents and publications of the Court which go to these Governments for information to be sent to them through the same channel.

This discrimination serves no useful purpose. To receive communications from the Court through the Secretariat puts the League Members at a disadvantage and is a waste of time and money. The practice should be abolished.

D. Advisory Opinions

The advisory jurisdiction would cease *de facto* unless the League of Nations survives or is replaced by a new organization to which the right of asking for opinions is transferred. In either case the United States may be expected to be represented on the body or bodies which would have the power to consult the Court. It may be hoped, therefore, that the apprehension that the advisory jurisdiction may prove dangerous to the United States will not revive, and that the question of maintaining this jurisdiction will be discussed on its merits.

1. Should the Advisory Jurisdiction be Maintained?

The Committee, in its majority, is of opinion that this question should be answered affirmatively, at least for the period of world reconstruction or until such time as it would have become clearly apparent that the system has lost its past usefulness. From the outset the Court treated its advisory function as a strictly judicial function and this character has now been permanently impressed upon it by the new chapter (Chapter 4, Advisory Opinions) with which the revised Statute ends.

Almost half the cases which came before the Court did so in the form of requests for advisory opinions. These requests arose (a) out of the discharge by the Council of its political functions—dealing with disputes, protecting minorities, etc.—or, in the case of the Free City of Danzig, out of the right for both parties to appeal to the Council from the decisions of the High Commissioner; (b) out of requests from Governments for submission of a dispute which had arisen between them to the Court for an opinion; (c) out of requests from international organizations (in particular from the International Labor Organization for elucidation of its own constitution or the conventions concluded through its operation and from the Mixed Commission for the Exchange of Greek and Turkish Populations).

In every case the opinion was accepted as deciding the questions put to the Court. There is no doubt that the procedure proved extremely valuable as an indirect method of securing judicial settlement of issues, or the essential legal aspects of issues, which were in dispute between Governments and would not, or could not, have come before the Court in any other way.

It is true that after 1932 there were only two requests for advisory opinions, both in 1935. This is, however, to be explained by two facts, namely the settlement of most of the legal questions arising out of the peace treaties and the growing deterioration of the international situation and consequent decline of the efficacy of the methods of which the League was the embodiment. It does not show that the advisory procedure was without permanent value in normal times. On the contrary the procedure has been proved to be:

a) A valuable resource for an international organization which is endeavoring to settle a dispute between Governments since, employed with the consent of the parties, it opens possibilities for obtaining judicial decision of the dispute, or of its legal aspects, which may amount to the same thing.

b) A convenient method of putting before the Court issues which divide Governments without causing them to contemplate an action.' (Thus an opinion on the extent of the jurisdiction of the European Commission of the Danube was obtained on the initiative of Great Britain, France, Italy, and Roumania after the latter state had refused to agree to a friendly action before the Court.)

c) A convenient way of securing judicial settlement of constitutional and other legal disputes arising within international organizations (competence of the organization) or concerning the interpretation of multilateral conventions concluded through the operation of such organizations. The League itself has not used advisory opinions for interpreting the Covenant, but the demarcation by the Council of the frontier between Turkey and Iraq in the Mosul region was made possible by an advisory opinion on the nature of the powers which the Treaty of Lausanne had conferred on the Council and, thereby, contributed to the elucidation of the Covenant.

It is true that, as Judge Anzilotti said in his dissenting opinion in the case

of the Danzig Legislative Decrees, "this function, which is only very exceptionally entrusted to courts, did not fail to give rise to grave doubts and misgivings with regard to its consistency with the essential function of the Court, i.e., the judicial settlement of disputes" [14] and it cannot be said that these misgivings have proved altogether unfounded. In one of its earliest pronouncements the Court refused to entertain the Council's request [15]; there have been other cases, however, where the Court did not see fit to do so and where it might have been preferable for its prestige, and also, perhaps, for the development of international law, if no advisory opinion had been given. The case of the Customs Regime between Germany and Austria and that of the Railway Traffic between Lithuania and Poland may be mentioned as examples.[16] In the first, the Council, which had it in its power to permit, on its own terms, an economic rapprochement between the two countries, implicitly refused to do so on any terms and threw on the Court the onus of determining the position in law as it resulted from this refusal. In the second, the Court, while not called upon to pass judgment on the Vilna dispute, was requested to give an opinion on the attitude adopted by Lithuania in the matter of railway traffic, as a result of the Zeligowski coup. There have also been cases where the formulation of questions purely *in abstracto*, without any reference to the facts of the dispute which had arisen, has caused inconvenience and embarrassment to the Court.[17]

At its very first session, however, the Court, concurring in the views expressed by Judge J. B. Moore,[18] concluded that it was not under an unconditional obligation to give advisory opinions upon request, and, as pointed out above, actually did decline to give such an opinion in the Eastern Carelian case. In any future text the discrepancy between the French (Elle donnera aussi . . .) and the English version of Article 14 of the Covenant (The Court may also give . . .) should be removed so as to make it abundantly clear that it is entirely in the Court's discretion to entertain or dismiss a request for an advisory opinion.

2. Procedure in Advisory Cases

One of Judge Anzilotti's reasons for dissenting from his colleagues in the case of the Danzig Legislative Decrees was that it had been impossible to put the Danzig political parties which had petitioned the Council on the same footing as the Senate by inviting them to assist the Court with evidence and arguments. The suggestion has been made that it might be well to broaden Article 66 of the Statute so as to include all persons, real or artificial, and all associations, national as well as international, considered by the

[14] Advisory Opinions, A/B 65, p. 60. [15] Advisory Opinion B 5 (Eastern Carelia).

[15] Advisory Opinions A/B 41 and A/B 42.

[17] Interpretation of the Statute of the Memel Territory; A/B 49, p. 311; also, concerning the definition of the port of Danzig, Polish Postal Service in Danzig, B 11, p. 41.

[18] Court Publications, Series D, No. 2, pp. 383–398.

Court as "likely to be able to furnish information." The majority of the Committee, however, is of opinion that this would go too far. The inability on the part of the Court to secure adequate information by the hearing of witnesses and experts would constitute, it would seem, one of the reasons why the Court might decline to entertain a request for an advisory opinion.

3. The Obtaining of Advisory Opinions

Opinions Sought by International Organizations.

In view of the juridical importance of the Court's advisory opinions, the general right to request such opinions should be confined to the Assembly and the Council of the League of Nations, or to similar organs of its successor. In particular, that right should not be granted to individual Governments.

Should it be granted to the International Labor Organization? A proposal to that effect was rejected by the First Assembly on the ground that this "might lead to consequences difficult to calculate in advance." [19] The importance of advisory opinions in the life of the International Labor Organization has, however, led to its consistently demanding direct access to the Court for this purpose. In 1928 a memorandum on the subject was sent to the Committee of Jurists which was examining the question of revising the Court's Statute. A similar memorandum was addressed to the League in 1936 in connection with the enquiry which the Council was making into the views of League Members regarding the conditions for validly voting a request for an opinion. On the basis of the experience acquired since 1920 the time seems to have come when the conservative decision taken in 1920 might be revised. Provided it was limited to obtaining opinions regarding the constitution of the International Labor Organization, the Conventions adopted under its auspices, and also any other instruments, such as the statutes of subordinate bodies, similarly adopted, there would seem to be no objections to conferring on that institution the right which it desires.

In the opinion of the Committee this grant should not be made to depend on whether or not it is deemed advisable to deal in a similar way with other unions of states. An affirmative decision, in the case of the International Labor Organization, which has enjoyed for nearly 25 years a large autonomy, would rest on its own merits.

Impressive arguments may be adduced for a similar grant, in the case of an overall international organization for communications and transit such as that which was created in 1920 and which played an important part in several cases that came before the Court (Jurisdiction of the European Danube Commission; Affluents of the Oder; Railway Traffic between Lithuania and Poland, etc.). That organization itself has, in virtue of several multilateral treaties, functions of conciliation and enquiry; similar functions, or arbitral functions, devolve upon bodies, legally subordinate to it, such as

[19] First Assembly, Plenary Meetings, p. 464.

the International Commission for Aerial Navigation, or, at least, acting within the same field, such as the Bern Unions for postage, telecommunications, and railways and the river commissions of Europe and, sometimes, as in the case of the latter, actually working in close coöperation with it. Whatever modalities may be favored in the pacific settlement of disputes in the field of communications and transit, it would seem desirable not to interpose political organs between the technical organs and the Court.

The League of Nations, or its successor, might, perhaps, be authorized to confer a corresponding privilege upon other international organizations at their request, provided their membership was limited to states and was worldwide in character. The question is different from that which has been considered in connection with Article 34 and it seems that a narrower circle should be drawn here.

Should Unanimity in the Council (Assembly) be necessary for requesting an Advisory Opinion?

This is a question of interpretation of the Covenant and not directly relevant to revision of the Statute. It seems, however, desirable to refer to it on account of the effect which the answer which it ultimately receives may have upon the Court's advisory jurisdiction. There can be no doubt that the development of that jurisdiction into a form of judicial settlement of disputes was due not merely to the Court's insistence on proceeding in a strictly judicial manner but also to the fact that no opinion was given without the states affected concurring in the proceedings.[20] In 1928, however, and again in 1935 a group of delegations at the Assembly sought to obtain recognition of the possibility of asking for advisory opinions by a majority vote. Their object was to cause the Council, when dealing with disputes, to seek the Court's opinion more frequently, irrespective of the views of the parties. This would be contrary to the Covenant unless either the asking for an opinion is to be deemed a question of procedure or it is held that the votes of parties can be disregarded. The real issue, however, was not legal but political. The debates and the subsequent consultation of the Governments by the Council showed that the League members were divided into two groups, those which at any cost desired to see all disputes referred to the Court and those which regarded the proposal to adopt the majority rule as an attempt to subject them to the compulsory jurisdiction of the Court without their own consent.

Should the rule be adopted that the votes of parties can be disregarded, it is hard to see how the Court's opinions could fail to become in fact, as they are in law, a mere form of advice, unless the practice of only asking for opinions when the states affected concurred in doing so were continued *de facto*. Should this practice be abandoned it would seem better, in the Court's

[20] On one occasion Poland and on another Turkey resisted the request for an opinion but they subsequently acquiesced in the proceedings by taking part in them.

interest, to abolish the advisory jurisdiction and create some other body for the purpose of considering the legal aspects of disputes brought before the League or its successor. One member of the Committee, however, expressed some doubts as to these conclusions. He pointed out that the questions involved might be questions in respect of which the parties concerned had accepted the compulsory jurisdiction of the Court in principle. He was also inclined to attach importance to the extent to which the organization within which the question referred to the Court arises conducts its business on the basis of unanimity or majority.

E. Revision of the Statute

Although in 1929 the conference of the parties to the Protocol of Signature and the Assembly were both unanimous in desiring that the revised text of the Statute should come into force before the general election of the judges in 1930, and had drafted the amending protocol in such a manner that the parties to the Protocol of Signature did not need to deposit formal ratifications, but had only to signify that they had no objection to the coming into force of the changes in the Statute, the laxness of some Governments and opposition from two others prevented the revision from taking effect until February 1, 1936.

It is, therefore, clearly desirable that the Statute should, if possible, be made more flexible and that part of its provisions, at least, should become susceptible of amendment otherwise than by the consent of all the states parties to that instrument. The Committee is, however, of opinion that, important as this is, the maintenance of the permanent character of the Statute is yet more important. If the price to be paid for flexibility were a provision enabling those who might object to the amendments to secede, then it would be better to renounce the idea of amendment by majority altogether.

Should a measure of flexibility be attainable without creating the possibility of secession, it would be prudent to require a qualified majority of at least two thirds, if not three fourths, and, as said above, perhaps to exclude from revision, except through unanimous consent, provisions of a fundamental character, such as the provisions of articles 2, 16, 17, 18, 34 to 38, 55, 56 and 59.

F. Final Remark

In conclusion the Committee would emphasize once more the paramount importance of the earliest possible resumption of the activities of the Court. All other considerations should be subordinate to that aim.

EDITORIAL COMMENT

SECURITY AND PEACE

Architects of the coming peace should note that the most urgent consideration, both for the world as a whole and for the United States, is security from war. In a world living under the threat of new wars, guns will often come before butter. But it is not only in the realm of food that all must be sacrificed to the god of war; in every field of human progress, freedom from the threat of war is the *conditio sine qua non*. In contrast with our policy after 1919, this truth must never be forgotten although, as we insist further on, security alone cannot guarantee us a lasting and satisfactory peace.

The vital role of security will appear in clearer outline if we examine the various measures which figure prominently as necessary steps toward a satisfactory international community. First, there are the measures of social reform. Ambitious plans are now afoot to aid repressed peoples, attenuate unemployment, and better the lot of the "common man." Comprehensive studies have been made of epidemics, social diseases, and malnutrition, and all-out campaigns to eliminate such evils are ready to be launched. But, whether such tasks are to be undertaken by national governments or some world authority, the great obstacle to their fulfillment is war or the mere fear of war. So long as a large part of the national budget is devoted to the national defense, little will remain for health, education and social reform. The best brains will be mobilized not to develop remedies for juvenile delinquency or malnutrition but to devise better tanks and faster airplanes. Furthermore, a great war even tends to discourage campaigns against slums and unhealthy factories, for such ills are dwarfed by the colossal misery and suffering caused in war to soldier and civilian alike. Reconstruction and reform can be planned only in the conditions of peace.

The second step is legal reform. In an effort to better the basic conditions of international security many people are working to improve and strengthen the present system of international law. Without international security, however, such reforms may prove abortive. Thus the attempt to establish on a firm foundation the natural rights of states, particularly their rights to national existence, independence, and equality, must await the abolition of war. For the possibility of war and its logical consequences—conquest, and treaties made under duress—make a mockery of the natural rights of states, however essential to the cause of peace and order. Nor can we expect the adoption of new rules so greatly needed to curb economic discrimination or establish freedom of the air so long as the ultimate preoccupation of states is the next war.

Again, major international economic reforms are seriously impeded by the possibility of war. High tariffs to protect strategic home industries, es-

pecially factories producing chemicals, vehicles, and machine parts, will be almost inevitable while war remains as a serious threat; self-sufficiency will be the goal of a state fearful of being cut off from crucial imports by blockade or conquest. George Washington maintained that the safety and self-interest of states "require that they should promote such manufactories as tend to render them independent on others for essential, particularly for military supplies." [1] States may sometimes make war in order to control vital raw materials, but this desire for control is itself a child of war. Consequently, international reforms designed to assure a more equitable distribution of the world's resources cannot succeed so long as states continue to plan for future wars, as they must do until they feel secure. Economic reforms are a result as well as a cause of peace.

Nor, so long as states live in imminent fear of attack, is there much chance that they will reduce their armaments. After 1918 the French kept a great army, the British maintained their fleet, and we ourselves insisted on keeping up our navy, and this simply because these establishments were considered essential to the national defense. We can take it as axiomatic that no country will in the future reduce its forces unless assured that its defenses will not thereby be weakened. Reduction of armaments, then, which all admit is a necessary move, if merely for reasons of economy, and a real contribution to a more peaceful world, can only be a consequence, not a cause, of security.

Imperialism, condemned as one of the causes of war, is, like the arms race, often merely one of the by-products of war. British imperialism in Egypt is explainable by a desire to keep open the Suez Canal and protect interests held vital to the safety and security of Britain. While we do not deny that often the desire for economic gain or national prestige lies behind imperialistic moves, it is still true that much of the incentive to imperialism would disappear were the world to be rid of war. Finally, many people believe that the best way to bring about a better world is to overcome the evils of nationalism and race hatred. None will deny the value of such efforts. But war itself is one of the greatest causes of exacerbated nationalism and hatred of the foreigner. We need only recall the wave of intolerance which spread across the United States after World War I. The bitterness engendered by our Civil War is only now dying out. The mere fear of war is a powerful stimulant to prejudice and race hatred, especially since any government preparing for a conflict may indoctrinate its citizens with the virus of passionate devotion to the flag and violent hatred of the enemy. Hence little can be accomplished by decrying the evils of national bigotry and patriotic passion until the threat of war is dissipated.[2]

[1] Washington's Works (Sparks ed.), Vol. XII, p. 8.

[2] "To charge patriotism, even in its pathological extreme, with being the cause of war or national rivalry is to put the cart before the horse. The misdirection or excess of patriotism results from the international anarchy." Mortimer Adler, How to Think About War and Peace, New York, 1944, p. 249.

Security alone, however, is not an adequate goal. Lasting peace cannot be assured merely by sitting on the lid while within the kettle poisons hiss and boil; eventually those poisons will boil over, or the kettle itself explode. Though effective international coöperation to serve the common interest cannot succeed without the security of peace, constructive international collaboration is necessary if the peace is to endure. For if, through apathy or negligence, the absence of appropriate collective institutions, or for any other reason, trouble spots are left untended and allowed to spread, causing maladjustment, suffering and misery, those living under the yoke of adversity will sooner or later decide to follow another Fuehrer who offers them relief, even at the price of tyranny at home and aggression abroad. So, unless we can construct a peace worth preserving, we shall not deserve, as we certainly shall not get, an enduring peace.

The very condition of security is orderly change; too much emphasis on security may lead to stagnation. "Peace," writes John Foster Dulles, "must also take account of the fact that life is essentially dynamic, that change is inevitable, and that transformations are bound to occur violently unless there are provided ways of peaceful change. Any world system is doomed if it identifies peace and morality with a mere maintenance of the *status quo*. To do this is to breed, as we have bred, the forces of revolution and revolt." [3] The orderly and progressive development of human society can only become possible through a common and never-ceasing struggle against illiteracy, unemployment, disease and famine; backward peoples must be raised from ignorance and aided to achieve their natural destiny; we must fight against the evils of nationalism, imperialism, and economic rivalries; we must break down psychological barriers and promote mutual understanding and tolerance. Thus security is not enough. Peace is not static, but dynamic. "Have nothing to do with any thin or idle peace, mere rest from toil and relapse from war. That is the peace of the dying." [4]

JOHN B. WHITTON

THE POSITION OF ARGENTINA

The present situation of Argentina *vis-à-vis* the United States and within the Inter-American System is ambiguous and abnormal. She remains a member of the Union of American Republics, is represented on the Inter-American Defense Board and on the Inter-American Economic and Financial Advisory Commission, both at Washington; she has a representative on the Inter-American Juridical Committee at Rio de Janeiro, and even on the Emergency Advisory Committee for Political Defense at Montevideo; yet, she is, so to speak, outside of the American family. She is not one of the

[3] "Peaceful Change," International Conciliation, April 1941, p. 43.

[4] Eric Linklater, The Raft and Socrates Asks Why. Two Conservations, New York, 1943, pp. 120–121.

United Nations, not entitled to lease-lend aid; yet she is far from being a neutral in the sense of international law. She has severed diplomatic relations with the Axis Powers, all her exports go to the United Nations, and she has recognized the American belligerents as "non-belligerents"—a curious phrase which symbolizes the chaotic status of the law of neutrality. She is the only American Republic which recognizes the revolutionary regime of Bolivia. Her own Government is not recognized by any American Republic, except Chile, Bolivia, and Paraguay.

There has been a certain tension between us and Argentina, at least since the conference at Rio de Janeiro in 1942; we are irritated by her internal situation and her foreign policy. There is a mutual distrust, nourished by misunderstandings, inaccuracies, and a policy of pin-pricks on both sides.

Let us, first, try to understand the situation of Argentina. In order to comprehend the internal situation, we must go back to 1930. From 1890 to 1930 Argentina knew no revolution; she looked down at her sister Republics, disturbed by continuous civil wars, and called them "republiquetas." But, in the wake of the great depression, President Irigoyen was overthrown by a military *coup d'état* on September 6, 1930; this started a period of crisis which still continues.[1] General Uriburu became Chief Executive and was followed by General Agustin P. Justo (1932–1938), the "strong man," not very democratic during his administration, with a strong appeal to public imagination, a perfect political opportunist. The very regime of the 1930 revolution, severely judged by Argentinians,[2] a military, dictatorial regime, started a trend toward a police state. Justo's successor, Roberto M. Ortiz, had, in consequence of illness, to leave the administration to Vice-President Ramón S. Castillo, first, in 1940, as acting President, then, on June 24, 1942, as President. Castillo was overthrown by a military *coup d'état* on June 4, 1943, out of which General Pedro P. Ramirez emerged as President. He was ousted in his turn by his war minister, General Edelmiro Farrell.

According to international law, there is no duty to recognize a revolutionary government, but certain prerequisites, laid down by international law, must be fulfilled, before recognition may be lawfully granted.[3] The first and most important is effectivity, which, in the case of the Farrell government, seems to be fulfilled. A second condition, often insisted upon, is the capacity and willingness to fulfill international obligations. Such declarations were made by the revolutionary government of President Villaroel of Bolivia, after the overthrow of President Peñaranda. Villaroel assured the United Nations that the revolution would have no effect on Bolivia's foreign policy.

[1] Cf. David H. *Popper* (Inter-American Monthly, May, 1942; pp. 10–11, 45–46; Ysabel *Fisk*: "Argentina, The Thirteen Years Crisis" in Foreign Affairs, January 1944, pp. 256–260).

[2] Cf. Alfredo *Colmo: La Revolución en la America Latina*, Buenos Aires, 1933 (2nd ed.).

[3] Cf. Josef L. *Kunz: Die Anerkenung von Staaten und Regierungen im Völkerrecht*, Stuttgart, 1928, pp. 110–168.

Such a declaration was made by the Ramirez Government on June 7, 1943, to the effect, that "Argentina reaffirms its traditional policy of friendship and loyal coöperation with the other nations of America in conformity with existing pacts." A similar declaration was made by the Farrell Government.

Legitimacy or legality, on the other hand, are not legal prerequisites of recognition; and the policy of the United States of insisting on the "constitutionality" of a new government followed during the 1920's, was definitely abandoned by the Hoover administration, with regard to other Latin American Republics, and, after Costa Rica and Salvador's denunciation of the Central American Treaty of 1923, also with regard to the Central American Republics.[4]

Although there can be no doubt that the Farrell regime, is, contrary to early Argentinian fictions of a perfectly constitutional change, a revolutionary Government, this fact is neither a legal nor a political reason for our non-recognition. The best proof is the recognition of the revolutionary Ramirez regime on June 11, 1943, by the United States and all the other American Republics.

The non-recognition stems rather from a new development, first applied to the Villaroel regime of Bolivia. As this Government was suspected of pro-Axis leanings and the revolution was under suspicion of having come into power "under the inspiration of pro-Axis forces outside of the country" (read: Argentina), the Montevideo Committee proposed that during the war no *de facto* government may be recognized, except after consultation between the American Republics, which are at war with the Axis or have severed diplomatic relations with the Axis Powers. This suggestion was approved, and no American Republic recognized the Villaroel regime except Argentina which, under the wording of the suggestion, did not participate in the consultation, a first split in Inter-American solidarity.[5] This new policy was followed *vis-à-vis* the Farrell regime. On March 4, 1944, Under-Secretary of State E. R. Stettinius announced that "the United States has refrained from entering official relations with the new regime pending developments."

The reasons for the less friendly relations between us and Argentina are manifold.[6] Argentinian foreign policy is firmly rooted in a long tradition,[7] which goes back to the attitude taken by Mariano Moreno [8] in 1810, whose

[4] For our recent recognition policy *vis-à-vis* Latin American Republics cf. Hackworth: Digest of International Law, Washington, 1940, Vol. I, pp. 174–192 and 222–281.

[5] It was stated by the Secretary of State on May 19, 1944, that the result of an investigation of Bolivian affairs being made by the U. S. ambassador in Panama would be communicated to the other American Republics, but that in the meantime our policy of non-recognition would stand (New York Times, May 19, 1944, p. 4).

[6] Cf. Clarence H. Haring, Argentina and the United States, Boston, 1941.

[7] Cf. Norb. Piñero, *La politica internacional argentina*, Buenos Aires, 1935, and *La Politica exterior de la Republica Argentina, Documentos*, Buenos Aires, 1931.

[8] Cf. J. Byrne Lockey, Panamericanism, Its beginnings. New York, 1920, pp. 284–5, and Ricardo Levene, *Significación histórica de Mariano Moreno*, Buenos Aires, 1937.

ideas against a political union of the Americas and for Argentine leadership constitute a living legacy to Argentine statesmen up to the present day. Resistance against a political union of the Americas, Argentine leadership, absolute sovereignty, non-intervention, resistance of any hegemony in the Americas, strong cultural and economic ties with Europe, far-reaching international arbitration, universalism not continentalism,—such have been the principles of Argentine foreign policy since 1810. She did not participate at the Bolivarian Congresses, resenting the leadership of Colombia; the famous note of Foreign Minister Elizalde to Peru in 1862 denies the existence of the Americas as a political entity and insists on Argentina "being identified with Europe to the utmost."

Her "impatience of the veiled tutelage of the United States" (Haring), made her the counter-player of the United States at most Pan American Conferences after 1889. In 1889 she vigorously and successfully combated the idea of an American Customs Union; Roque Saénz Peña, in a famous speech, said that he did not lack affection for America, but lacked suspicion and ingratitude toward Europe, "where there is Spain, our mother, Italy, our friend, France, our sister" and concluded with the celebrated phrase: *Sea la América para la Humanidad!* Similar ideas—sovereignty, opposition to an American Confederation, strong ties with Europe—were expressed in the Argentinian inauguration address in Buenos Aires 1910, by Saavedraa Lamas at Montevideo 1933, in the inaugural address of President Justo at Buenos Aires 1936, in Lima 1938 by Cantilo, who called universalism the traditional attitude of Argentina, and by Melo in Panama, 1939.

The universalistic attitude was shown in Argentina's proposal at the first Assembly of the League of Nations, and also her pride and touchiness: when the proposal was rejected, Argentina left Geneva immediately and did not return for more than a decade. Her lack of success at Santiago 1923, in advocating far-reaching compulsory international arbitration,[9] had probably something to do with her obstructionist attitude at later Pan American conferences. Notwithstanding the Calvo and Drago doctrines, Argentina stood always for a universal international law and against the concept of an "American International Law."[10] She did not attend the Washington Conference of 1929, she hardly ratified any Pan American Convention and her own "*tratado anti-bélico*" 1933 was significantly open to adhesion by non-American States.

Just as Argentina remained, under President Irigoyen,[11] neutral in the first World War, under the impact of Argentine traditional ideas, thus her

[9] "*El arbitraje amplio*" under the so-called "*fórmula Argentina.*"

[10] Cf. the observations of D. Antókoletz on the non-existence of an American International Law (*Quinta Conferencia Internacional Americana*, Santiago, 1923. *Actas*, Vol. I, pp. 433–442). In the same sense Antókoletz and Saavedraa Lamas spoke at the Buenos Aires Conference 1936.

[11] Cf. L. M. Moreno Quintana, *La diplomacia del Presidente Irigoyen, 1916–22*, La Plata, 1928.

present attitude is hardly a consequence of Axis propaganda, although quite a few of her leaders, no doubt, were impressed by early German victories, or are ideologically in favor of certain features of Mussolini's fascism or Franco's Hispanidad.[12] Her present attitude is probably primarily a consequence of Argentinian traditions and of a balance in internal politics between a pro-democratic opposition from the left and a pro-Axis opposition from the right.[13]

From 1933 to 1942 the Secretary of State has wooed Argentina, and has shown a never-ending patience, in an effort to arrive by concessions at the Argentine point of view and, with the aid of Brazilian mediation, at unanimous agreements, even if they did not fully correspond to our wishes. Thus it was as a concession to Argentina that Resolution I at Rio de Janeiro, in 1942, merely "recommended" the severance of diplomatic relations with the Axis. But just for this very reason the continuous assertion in this country that Argentina, by not breaking diplomatic relations with the Axis, has "violated" the Rio Resolution, is, of course, legally untenable. The Resolution has no legal binding force, is a mere recommendation, and leaves the breaking of diplomatic relations entirely to the discretion of every American Republic.

But while the Rio Resolution was not binding in law, the permission of Axis espionage activities by Argentina,[14] to the detriment of United States ships and lives, is clearly illegal.

It is certainly our right to defend ourselves against illegal acts. The recognition of *de facto* governments is no duty under international law. Our attitude is, therefore, legally free from blame. But the political question remains, whether it is wise to continue a policy of non-recognition or to try, e.g. by economic pressure, to force Argentina to adopt a foreign policy in accordance with our wishes. The present internal dictatorship and the foreign policy of Argentina are unwelcome to us, and, it is suggested, not to the interest of Argentina herself. Yet, continued non-recognition has its dangers. It is reported [15] that Argentina has expropriated several subsidiaries of the American and Foreign Power Company at extremely low compensations, at a time when no American ambassador is able to do anything to protect the interests of American nationals. Argentina may be led into the policy of trying to create a South American bloc in the River Plata Basin, and thus definitively split Inter-American solidarity, which is already threatened now.

[12] Hispanidad gained much in Argentina through the Eucharistic Congress held at Buenos Aires in 1934. See the speech by the Cardinal-Primate of Spain, Dr. Goma y Tomas: *Apologia de la Hispanidad* (reprinted in Ramiro de Maeztu, *Defensa de la Hispanidad*, Valladolid, 1938 (3rd ed.), pp. 309–354).

[13] Cf. K. Loewenstein in Harvard Law Review, July 1943, pp. 1261–1306.

[14] First alluded to in Sumner Welles's Boston speech of October 8, 1942, then proved by the presentation of three documented memoranda to Argentina in November, 1942.

[15] New York Times, May 14, 1944, p. 16.

We may think of the British attitude, *vis-à-vis* Eire, which included insistence upon Eire's neutrality but no attempt to force her away from neutrality, not even in Britain's hour of deadly peril; the continued unity of the British Commonwealth of Nations was considered more important.

Although some see in Argentina a post-war threat to the unity of the Americas,[16] it is to be hoped that Argentina will come back fully into the American family and that thus a definitive split in continental solidarity and good neighbor policy will be avoided. It is submitted that, for these reasons, the former Under-Secretary of State, Sumner Welles, is right, when he recommends in recent articles the abandonment of non-recognition as an instrument of foreign policy, and even speaks of the adoption of the Estrada doctrine,[17] subject always to the possibility of breaking off diplomatic relations, upon any of the grounds laid down by international law.

JOSEF L. KUNZ

THE POLISH BOUNDARY QUESTION

Russia's armies have penetrated a considerable distance into Eastern Poland, which she contends is Russian territory, just as she claims that the Baltic States are as much Russian as California is American. In this contention she has insisted on the so-called "Curzon line" as the final boundary between Poland and Russia. Making no headway in this regard in negotiations with the Polish Government in exile, which insists on the pre-war boundary, Moscow has attacked the Polish Government [1] as pro-Fascist and non-representative of the Poles at home and appears to have set up a "Polish National Council" reportedly headed by the wife of the Vice Commissar of Foreign Affairs of Russia who was recently made Foreign Commissar of the Russian Ukraine, which Council, Stalin declares, is more representative of the Polish people. Russia at the same time has also, significantly, granted greater autonomy to the constituent republics of the U.S.S.R., which apparently would allow treaty arrangements between the Ukraine and a puppet government of Poland in regard to Polish independence and boundary questions. Stalin is undoubtedly proceeding unilaterally in this matter for he has rebuffed mediation by Mr. Hull and Mr. Churchill, although the Moscow declaration stands for the "closest coöperation between the three Governments in the examination of European questions arising as the war develops."

Space will not permit a full discussion of the ethnologic, economic, and

[16] Cf. Lloyd Mallan in Virginia Quarterly Review, Winter, 1944.

[17] Cf. this JOURNAL, Vol. XXV (1931), p. 719; Juan José Soler, La Doctrina Estrada sobre reconocimiento de los gobiernos de facto, *Revista de Derecho Internacional*, Vol. XIX (1931), pp. 5–15.

[1] The Polish Government in exile has been recognized by Britain and the United States and has adhered to the Atlantic Charter and other declarations and agreements which makes Poland our ally and one of the United Nations. Russia "suspended relations" with Polish Government, April 26, 1943, over the attitude of the latter toward the alleged murder of Polish officers near Smolensk.

other questions involved in this incident. Only a review will be attempted of the treaty and other engagements relating to the boundaries of the Polish state. The Poles are a vigorous and patriotic people who have inhabited for centuries the basin of the Vistula River which enters the Baltic at Dantzig. This ancient people, whose roots in this territory go back more than ten centuries and who have often illumined the fields of art, letters and science, live between powerful neighbors and traditional and covetous enemies. They have experienced greater vicissitudes perhaps than most nations but have maintained a national spirit which has refused to acknowledge defeat or admit extinction.

Once counted as one of the few great states of Europe Poland, after her final partition between Russia, Prussia, and Austria, in 1795, ceased to exist as an independent state until it was reëstablished by the peace treaties following the World War of 1914–18. The intervening period had been one of repression and insurrection under the yoke of the partitioners. At the outbreak of war in 1914 the recrudescence of Poland began. A National Committee was formed to represent the Polish people in their struggle for independence, President Wilson came out (January 22, 1917) for an independent and united Poland as one of his fourteen points, the Allied Governments recognized the National Committee in Paris and declared for Polish independence,[2] and Polish armed forces were organized and fought on the side of the Allies against the Central Powers.

During the period of weakness following the Bolskivik Revolution in the Fall of 1917, which was most firmly established in Northern Russia, the marginal states seized the opportunity to disengage themselves from the grasp of the Empire by declaring their independence. As a part of the Russian weakness came the Brest Litovsk Treaty of March 3, 1918 between the Lenin Government and Germany and her allies. This treaty, which Russia entered into from a mixture of weakness and credulity, proposed a common boundary running from near Riga irregularly southward to the Ukrainian border in the direction of Lemberg, and created an Ukrainian State under German control.[3] The Bolskivik plenipotentiaries protested vigorously and piteously at the compulsion and overreaching of the Germans, contrary to prior promises, and the Allied Powers also protested the treaty but of course to no avail.

In November, 1918, a Polish Government was organized and the Polish Republic was proclaimed to the world; it was recognized by the Allied and Associated Powers early in 1919. Meanwhile the Peace Conference at Paris had produced the Treaty of Versailles which Poland signed on June 28 of the latter year as an independent and sovereign state. The Peace Treaties re-

[2] It appears that the Bolshiviki recognized the independence of Poland in March, 1917 (Polish Handbook, 1925, p. 72).

[3] The Ukraine was reconquered by the Red Armies in 1919–20 and in 1923 became a constituent Republic of the U.S.S.R.

stored to Poland parts of the territories formerly governed by Russia, Austria-Hungary, and Germany. The Commission on Polish Affairs of the Conference worked out the frontier between Poland and the Central Powers which became Articles 83 and 87 of the Treaty of Versailles.[4] Thus the Western boundaries of Poland were definitely provided for at Paris but the Eastern boundaries were left unsettled because Russia was not represented at the Peace Conference. Germany agreed in the Treaty of Versailles to the abrogation of the Brest Litovsk Treaty and all other agreements with Russia and to retire her forces from the Baltic provinces of Estonia, Latvia, and Lithuania (Article 433).

The Eastern boundaries of Poland were left to the Allied and Associated Powers to settle later. On December 8, 1919, the Supreme Council announced a tentative line pending final settlement. This line was not accepted by either country concerned.

By this time Poland had plenty of recognition, some army in the field, but no cleancut territory. She decided to fight her way. First she took on the Ukrainians, defeating them in 1919 near Lwow and occupying Wilno. At this time the Bolshiviki, awake to their past mistakes, were attempting to recover territories belonging to the former Russian Empire. This attempt resulted in war with the Polish Army. During these hostilities Lord Curzon, then Foreign Minister of Great Britain, in an effort to compose the conflict sent a telegram, on July 11, 1920, suggesting an armistice on the basis of the line announced on December 8, 1919 by the Supreme Council. This line thereafter became known as the "Curzon line" although that gentleman seems to have had no direct hand in its determination. The warring countries were, however, still unwilling to accept the line, but the Polish victory at Warsaw in August led to the armistice of October 5, 1920, which led to the Peace Treaty signed at Riga on March 18, 1921.

The Riga Treaty, in Article 2, describes in detail the boundaries between Russia and Poland by reference to various rivers and towns. Article 3 reads as follows:

> "Russia and the Ukraine abandon all rights and claims to the territories situated to the West of the frontier laid down by Article 2 of the present Treaty. Poland on the other hand abandons in favor of the Ukraine and White Russia all rights and claims to the territory situated to the East of this frontier. The two Contracting Parties agree that, in so far as the territory situated to the West of the frontier fixed in Article 2 of the present Treaty includes districts which form the subject of a dispute between Poland and Lithuania, the question of the attribution of these districts to one of those two states is a matter which exclusively concerns Poland and Lithuania."[5]

[4] The plebiscite in Upper Silesia (Art. 88) was held in 1921 and the German-Polish Agreement thereon of May 15, 1922, established that piece of the boundary. (Sarah Wambaugh, Plebiscites Since the World War, p. 26.)

[5] Polish White Book, 1933–9, pp. 164–5.

This treaty stabilized the Eastern boundary of Poland down to 1939, but the boundary with Lithuania was still an open question. During the war in 1920 Poland had claimed that the Lithuanians and Russians were combining against her and had pushed her forces into Wilno. Notwithstanding a "military agreement" signed by the contesting parties under the auspices of the League of Nations, the Poles raided and seized the city of Wilno (the Lithuanian capital) and the district of that name, and retained them. Lord Cecil called it an "international scandal," but the League appears eventually to have accepted it as a *fait accompli*.[6] Lithuania declined to recognize the *coup* and retaliated by closing the frontier and refusing diplomatic relations with Poland. However, in March, 1938, under threats from Poland, diplomatic relations were resumed but the boundary line appears to have remained unsettled.

Returning to the Riga Treaty line of 1921, it should be noted that this was confirmed by the so-called Conference of Ambassadors of the Allied Powers (not including the United States) in a Declaration of March 15, 1923, which was also signed by Poland. This Declaration recognized Poland's possession of Eastern Galicia and also established a Polish-Lithuanian boundary leaving Wilno to Poland. Lithuania refused to accept this line, claiming Wilno itself and the whole of Wilno district.

Other formal acts cementing the relations of Poland and Russia on the basis of the Riga Treaty followed. On February 9, 1929, Russia, Poland, Estonia, Latvia, and Roumania signed at Moscow a Protocol bringing into effect between them the Pact of Paris of August 27, 1928, renouncing war as an instrument of national policy. Four years later (on July 25, 1932) Poland and Russia entered into a Non-aggression Pact for a period of five years. This Pact referred to the Treaty of Riga of March 18, 1921, as constituting "now as in the past the basis of their reciprocal relations and undertakings." [7]

[6] It is said that Pilsudski, then Commander-in-Chief of the Polish forces, was a Lithuanian born near Wilno. Newman, The New Europe, pp. 187–190. See generally the excellent work of Sarah Wambaugh, Plebiscites Since the World War, pp. 307 ff.

[7] The Pact in part reads as follows:

"Art. 1. The two Contracting Parties, recording the fact that they have renounced war as an instrument of national policy in their mutual relations, reciprocally undertake to refrain from taking any aggressive action against or invading the territory of the other Party, either alone or in conjunction with other Powers.

"Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other Contracting Party shall be regarded as contrary to the undertakings contained in the present Article, even if such acts are committed without declaration of war and avoid all possible warlike manifestations.

"Art. 2. Should one of the Contracting Parties be attacked by a third State or by a group of other States, the other Contracting Party undertakes not to give aid or assistance, either directly or indirectly, to the aggressor State during the whole period of the conflict.

"If one of the Contracting Parties commits an act of aggression against a third State the other Contracting Party shall have the right to be released from the present Treaty without previous denunciation.

"Art. 3. Each of the Contracting Parties undertakes not to be a party to any agreement openly hostile to the other Party from the point of view of aggression." (Polish White Book, 1933–1939, p. 171.)

By a Protocol of May 5, 1934, the signatories renewed the Pact for a period expiring December 31, 1945, and for two-year periods thereafter if not denounced by either party. This Protocol refers again to the Peace Treaty of 1921,[8] and was further confirmed in a joint communiqué on Polish-Soviet relations issued on November 26, 1938.[9] Russia had thus far apparently raised no question as to the Riga line, which had not been challenged since 1921.

On July 3, 1933, Poland, Russia, and several border states signed at London a Convention (adhered to by Finland July 22, 1933), defining the term "aggression," used in the non-aggression Pact above mentioned, as including the following actions:

> "2. Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
> "3. Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;"

The Convention further provided in Article 3 that:

> "No political, military, economic or other considerations may serve as an excuse or justification for the aggression referred to in Article 2 (for examples see Annex)."[10]

Peaceful intercourse continued, though it may be that the two nations were not on the most cordial terms, for their viewpoints and aspirations were far apart. Russia was a totalitarian communistic crusader, with an oriental outlook, whereas Poland was nearly the opposite. In the summer of 1939 Russian-Polish relations seemed outwardly friendly, but at the same time Stalin and Hitler were negotiating a ten year non-aggression pact (August 23, 1939) against any warlike act between them and providing (Article 4) that "neither shall participate in any grouping of powers which directly or indirectly is aimed at the other party." Thus Russia was bound by treaty not to join any country in an attack on Poland or Germany. In view of the growing tension between Germany and Poland, and the world wide attention being given to the rift, can it be said that Stalin at this time had no inkling of Hitler's intention to attack Poland and to dismember her?

Nine days later (September 1, 1939) Hitler attacked Poland.[11] The German invasion upset the equilibrium established by the Riga Treaty and Russia reverted in conjunction with Germany to the policy of expansion. The first step was the occupation by Russia of Eastern Poland, the second was the control of the Baltic states, and the third was the aggression against Finland.

[8] Same, p. 179. [9] Same, p. 181.

[10] The Annex declared that no active aggression could be justified because of "(a) the internal condition of a state . . . or (b) the international conduct of a state," of which examples were given. (Same, pp. 173–4.)

[11] Hitler's demands included a settlement of the Dantzig problem, the Corridor problem, and the problem of German minorities in Poland.

On September 17, 1939, M. Potemkin, Russian Vice Commissar of Foreign Affairs, called in the Polish Ambassador and handed him a note to the effect that the German-Polish war revealed "the internal bankruptcy of the Polish state" which means that "the Polish state and its Government have in fact ceased to exist," that the agreements with Poland "have ceased to operate" and that Russia has "ordered troops to cross the frontier" to protect "the kindred Ukrainian and White Russian peoples who live on Polish territory" and who are left defenseless.

The Polish Ambassador refused to accept the note, protested the aggression and asked for his passports. Poland informed France and England that Soviet forces had entered Poland on September 17, thereby violating the non-aggression Pact of July 25, 1932, as defined in the Pact of July 3, 1933. Poland added that Russia "stands self-condemned as a violator of its international obligations," contrary to the moral principles on which she pretended to base her foreign policy since her admittance to the League of Nations.

Ten days later (September 28, 1939) Ribbentrop and Molotoff entered into an agreement specifying the line for the fourth partition of Poland, called the Ribbentrop line. To this agreement the Polish Government made a vigorous protest on September 30. This line ran roughly through the middle of Poland southward along the River Bug and, crossing over to Jaroslaw, thence along the River San. Thereupon Russia by an agreement with Lithuania, dated October 10, 1939, handed the city and part of the district of Wilno over to the latter and fixed the boundary between them.[12]

The Russian Government now (on October 22) ordered an "election" for the "People's Assemblies" in the occupied area of Poland while under military control. The Assemblies of the Ukraine and White Russia then petitioned Russia to be incorporated into the U.S.S.R. The Soviet graciously granted the petitions and promptly took over all lands, banks and industries.[13]

Hitler's surprise attack on Russia in June, 1941, brought about an abrupt reversal of relations between the latter and the Polish Government then in exile in London. Hardly six weeks later, on July 30, 1941, the Soviet and Polish Governments signed an Agreement in London of which Article I reads:

> "The Government of the U.S.S.R. recognizes the Soviet-German Treaties of 1939 as to territorial changes in Poland as having lost their validity. The Polish Government declares that Poland is not bound by any agreement with any third Power which is directed against the U.S.S.R."

The Agreement provided also for the restoration of diplomatic relations

[12] The agreement included a Pact of mutual assistance to supplement their non-aggression Pact of September 28, 1926. During the negotiation of her demands on Finland in November, 1939, Russia denounced the non-aggression Pact of 1932 and on November 30 Russian troops invaded Finland and bombed Helsinki and Viborg from the air.

[13] David J. Dallin, Soviet Russian Foreign Policy, 1939–42, p. 75.

and for mutual "aid and support of all kinds in the present War against Hitlerite Germany." The U.S.S.R. agreed to the formation on her territory of a Polish army under a Polish Commander subject to the Russian Supreme Command; the details were arranged in the Agreement of August 15, 1941. In a Protocol annexed to the agreement the Soviet Government granted "amnesty to all Polish citizens now detained on Soviet territory." [14]

At the time of signature Mr. Eden handed the Polish Prime Minister a note to the effect that the British Government had entered into no undertaking towards the U.S.S.R. which affected the relations between that country and Poland, and that "the (British) Government did not recognize any territorial changes which had been effected in Poland since August 1939." General Sikorski replied that his Government "have never recognized any territorial changes effected in Poland since the outbreak of the present War." [15]

On August 14, 1941, the Atlantic Charter was proclaimed, which expressed "a desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned." In the next month (on September 24), at an inter-Allied meeting held in London, Russia and Poland agreed to a resolution in which the parties made known their adherence to the common principles of the Atlantic Charter and "their intention to coöperate to the best of their ability in giving effect to them." [16]

In this connection reference should be made to the Treaty of Alliance between Russian and Great Britain signed on May 26, 1942, for full collaboration between the two Governments during and after the present war. It recited that it was to replace the agreement of July 12, 1941, concerning joint action against Germany and that the intention was to collaborate on the basis of the principles of the Atlantic Charter. After providing that the Contracting Parties would afford each other all kinds of support and assistance in the present war against Germany or any future war with Germany or any state associated with her, they agreed that "they will act in accordance with the two principles of not seeking territorial aggrandisement for themselves and of non-interference in the internal affairs of other states."

What is to be concluded from the events reviewed above? Aside from ethnographic, economic, and other considerations involved, it seems clear that Russia in 1939 set aside a territorial arrangement which she had made and repeatedly confirmed and which she had solemnly pledged to respect and carry out; that, although Stalin repented in 1941 and reëstablished the *status quo ante*, he is now brow-beating the Government of his conquered neighbor, which he had already recognized and treated with (but which he now refers to as the "so-called Government of Poland"), into submitting to

[14] Bulletin of International News, Vol. XVIII, p. 1016. It is understood that thousands of Poles had been seized and deported to Russia during the occupation.

[15] Same.

[16] British Comd. paper 6315, Misc. No. 3 (1941).

his unilateral demands on the pain of setting up a puppet government in Poland which will do his bidding. Furthermore, this arbitrary action has been taken in flat contravention not only of his treaty obligations but of the Declarations of Moscow and Teheran looking to the rebuilding of public law and international stability and "closest coöperation" in settling just such questions as the Polish problem.

LESTER H. WOOLSEY

THE RECOGNITION OF NEW GOVERNMENTS INSTITUTED BY FORCE

The resolution of the Committee of Political Defense, taken at Montevideo on December 24 last, recommending consultation between the American Governments before recognizing a new government instituted by force, has emphasized once more the undeveloped and unsatisfactory state of international law in this field. The general principles governing the recognition of governments coming into power in violation of constitutional procedures are well established. The Argentine jurist, Luis Podesta Costa, in his recently published volume on international law, aptly sums up the law as calling for the application of the objective test of effective possession of authority and the subjective test of readiness on the part of the new government to meet the international obligations of the State. These are, indeed, the standard tests that in one form or another have been adopted by the Foreign Offices of the leading powers for a hundred years. The real difficulty appears when we come to apply them to the concrete situations of practical international life; and the conditions of the present war have but added to the difficulty.

It would be hard to say which of the two tests gives rise to more controversial issues. The objective test of effective possession of authority involves a number of elements sometimes put down as separate tests. Doubtless the fundamental element is that relating to the representative character of the government. Is the new government entitled to speak in the name of the state, so that on the one hand it may assert the legal claims of the state and on the other hand create a responsibility on the part of the state for its conduct? It would seem just that the answer should be dependent upon the evidence available that the new government is holding office with the assent of the people or at least with the acquiescence of the people. How is such assent or acquiescence to be determined under the circumstances? In normal usage assent or acquiescence is implied from the fact that the new government is in actual control of the administrative machinery of the state, is performing normal governmental functions, and is not meeting with open resistance to its authority. "Stability" is the word oftenest used to describe this *de facto* situation, and it is in practical application the equivalent of "effective possession of authority."

Obviously the more adequate method of determining whether the new

revolutionary government expresses the will of the people would be the holding of popular elections. But elections, to be worth anything as an expression of the will of the people, would have to be honest elections; and could any elections be honest unless freedom of speech, freedom of the press and the right of public assembly existed? Clearly third states could not inquire into these points in any conclusive way without interfering so greatly in the domestic affairs of the state as to constitute an intolerable violation of its sovereignty and independence. In consequence international law has in the past followed the more realistic rule of regarding *de facto* control over a given period as implying the general acquiescence of the people. How long a time third states must wait before reaching the conclusion of general acquiescence is a matter to be determined by the circumstances of each case.

The example set by the five Central American Republics in 1907 and in 1923, in seeking to discourage revolutions by a common agreement not to recognize a new government until certain conditions had been met, commendable as it was from the point of view of mutual coöperation in the maintenance of law and order within their respective countries, was in advance of the existing rules of international law. Unfortunately two of the five Republics found the provisions of the treaty of 1923 embarrassing and later denounced the treaty. It is interesting to note that the Tobar Doctrine, which found expression in the two treaties, has been generally attacked by other Latin American jurists, possibly because Señor Tobar recognized a right of intervention in this "indirect way" in the internal dissensions of the American States. In reality the fact that the treaties of 1907 and 1923 were mutual agreements, applicable only to the parties to them, completely eliminated any element of intervention.

The doctrine put forth by the Mexican Foreign Minister, Sr. Estrada,* in 1930, to the effect that any judgment passed by other states upon the legal qualifications of the government of a state is an offense against its sovereignty, seems to suggest that the legitimacy or illegitimacy of a new revolutionary government is of no proper concern to third states, and that any inquiry on their part into the national status of a government is unwarranted. But in actual fact the inquiry into the status of a revolutionary government is a necessary condition of international intercourse and it is implied in the very maintenance or withdrawal of diplomatic relations which Sr. Estrada proposed as the proper procedure for Mexican diplomatic officers. Admitting the abuses against which the Estrada Doctrine was directed, it may be pointed out that it is in the interest of international justice that revolutionary government should not have the right immediately upon assuming office to pledge the good faith of the state and create contractual obligations for which the state itself would be responsible. There is no question here of the fundamental right of all people to choose their own form of government and no question of the right of the new revolutionary government to ad-

* See this JOURNAL, Vol. 25 (1931), Supplement, p. 203.

minister, so far as it can, the domestic affairs of the state. Foreign diplomatic representatives may well continue to treat with it in matters of routine protection of life and property. But before a treaty may be signed with the *de jacto* government, or other commitment entered into, it is reasonable, and such has been the established practice, that third states should have assurance that the government is sufficiently well established to be taken as spokesman for the people of the state. To this extent there is no avoiding some procedure which, if not recognition in form, would be the equivalent to it.

The second of the two standard tests, that of willingness on the part of the new government to observe the rules of international law and to fulfill the international engagements of the state has normally been judged by its actual performance after it has come into power. It is the custom for a new government upon taking office to make public proclamation of its intention to carry out its international obligations; and under ordinary circumstances this assurance is taken by other states at its face value. The failure of the new government to live up to its obligations would naturally give rise to diplomatic protest but this would be entirely apart from any question of the representative character of the government.

To what extent may the circumstances under which a new government comes into power be taken into account in determining in advance the sincerity of its proclaimed intentions and in refusing recognition when the evidence points to probable violation of international obligations? Obviously the political, economic, and social conditions out of which the revolution may appear to have arisen have a bearing upon the representative character of the new government and its probable stability. But international law has been unable to develop a rule to meet so complex a situation, involving, as it of necessity must, an interference in the most intimate domestic affairs of the state. Nor has international law developed a rule to meet the situation where the inquiry extends not merely the circumstances under which the new government has come into power, but the character and past record of the leaders of the revolutionary movement who have taken over the control of the new government. It has remained for the exigencies of the present war to present this issue and to present it in challenging form.

In normal times of peace the failure to fulfill international obligations is not a matter of such urgency as to make it necessary to anticipate wrongful conduct on the part of a new government. The fact of the violation of international obligations can be readily determined and redress obtained in due course. But in time of war a very different situation is presented. The recommendation of the Committee of Political Defense dealt with commitments for the defense of the continent, obligations beyond any to which the existing rules of international law were applicable. The most important of the commitments of continental defense undertaken at the meeting of Foreign Ministers were those relating to "subversive activities" of Axis

agents. One has only to read the impressive list of the earlier recommendations of the Montevideo Committee to understand how wide and deep are the possible ramifications of these activities and how little confidence third states might have in their elimination by a government not whole-heartedly opposed to the cause of the Axis Powers in favor of which they were being carried on. The urgency of the situation, moreover, was such as to make any failure on the part of administrative officials of the new government to suppress the subversive activities a matter of the gravest consequence. A single radio station maintained along the coast line might mean the loss of American ships and lives, for which no subsequent amends by way of punishment of the offenders could make good.

Confronted with this situation the Committee of Political Defense believed it necessary to recommend that the American Governments should not only inquire into the actual conduct of the new government but should endeavor to anticipate its possible conduct by an inquiry into the circumstances which led to its establishment. It appears that the word "circumstances" was broad enough to include an inquiry into the character and past record of the leaders of the revolutionary movement. It is to be assumed that it was the intention of the Committee that if the American Governments should find that the circumstances attending the establishment of the new government were such as to indicate probable non-compliance with inter-American commitments for defense they would refuse recognition to the new government without waiting to see what its actual performance might be.

In view of special conditions under which it acted, it was to be expected that the Committee of Political Defense should confine its recommendation to "the duration of the present world conflict." Moreover, while the Committee might reasonably have hoped that the proposed consultation should be followed by uniform action, it stopped short of recommending a collective decision, leaving each state free to act for itself after consultation. The replies from the American Governments indicate that the Committee acted with commendable discretion. A number of them, while accepting the recommendation of the Committee, hinted at the dangers of "intervention" which might attend any extension of the application of the procedure of consultation and common action.

It is clear that the formulation of more specific rules of international law in the matter of recognition is dependent upon factors which cannot readily be divested of their political character. If it is the province of international jurisprudence to widen the circle of law by reducing political to juridical questions, it is also the part of jurists to recognize all of the various practical obstacles to the development of law in a particular field. Doubtless the most serious of these is the fact that non-recognition has been used at times in the past as a means of coërcion by stronger states against weaker ones. The abuses that have occurred in this connection, however, have been partly due to the constitutional instability of the governments which have suffered

from them. The conflicting interests to be reconciled by new rules of law are on the one hand the fundamental right of each state to determine its own form of government and on the other hand the right of other states and of the community of states as a whole to be able to deal with responsible governments which truly represent the will of the people of the state not the will of a small group. The two sets of interests are not inherently irreconciliable. Doubtless the establishment of a general system of international security will do more than anything else to remove such fears as may exist of intervention by stronger states in the domestic affairs of weaker ones. But at the same time it is equally important that each individual state should recognize its own responsibility in maintaining its constitutional procedures as an essential condition of its coöperation as a member of the international community. It is not necessary that these procedures be uniform in each state; the economic and social conditions of each state will naturally influence the nature of its machinery of representative government. But stability must be maintained, and it can only be maintained, on the basis of what Jefferson once described as "the will of the nation, substantially declared."

C. G. FENWICK

THE STATUS OF THE VATICAN CITY

The liberation of Rome by the Allied forces on June 4, 1944, has served to focus attention on the legal status of the State of the Vatican City, a 108-acre enclave in the city of Rome. Under the terms of the Lateran Treaty between the Holy See and Italy, signed on February 11, 1929,[1] Italy recognized (Art. 2)—

> the sovereignty of the Holy See in the international field as an attribute inherent in its very nature, in conformity with its tradition and with the exigencies of its mission in the world—

and recognized (Art. 3)—

> in the Holy See the full proprietorship and the exclusive and absolute power and sovereign jurisdiction over the Vatican, as at present constituted, with all its appurtenances and endowments, creating for such purpose the Vatican City.

In addition to recognizing the full sovereignty of the Holy See over the Vatican City proper, the boundaries of which were indicated in a plan annexed to the treaty, Italy also recognized in the Holy See the full proprietorship only (not absolute power and sovereign jurisdiction, as in the case of the Vatican City proper) "of the patriarchal Basilicas of St. John Lateran, of St. Mary Major and of St. Paul, with the buildings annexed" (Art. 13) and

[1] Italian text and English translation in National Catholic Welfare Conference, Treaty and Concordat between the Holy See and Italy, Washington, 1929, pp. 37–51; English translation reprinted in this JOURNAL Vol. 23 (1929), Supplement, pp. 187–195, and Byrnes MacDonald, The Italo-Vatican Accord: An Analysis, Princeton, N. J., 1932, pp. 85–95.

also "of the pontifical palace of Castel Gandolfo with all its endowments, appurtenances and dependencies," then actually in possession of the Holy See, and obligated itself to cede to the Holy See, likewise in full proprietorship only, "the Villa Barberini in Castel Gandolfo with all its endowments, appurtenances and dependencies" and to transfer to the Holy See certain real property on the North side of the Janiculan Hill overlooking the Vatican palaces in order to round out the sites belonging to the Sacred Congregation of Propaganda Fide and to other ecclesiastical Institutes (Art. 14).

The properties indicated in the preceding paragraph, together with—

> the palaces of the Dataria, of the Cancelleria, of the Propaganda Fide in the Piazza di Spagna, the palace of the Holy Office and adjacencies, that of the Convertendi (at present Congregation for the Oriental Church) in the Piazza Scossacavalli, the palace of the Vicariate, and the other buildings in which the Holy See in the future shall deem it necessary to establish its other Offices, although forming part of the territory of the Italian State, shall enjoy the immunity recognized by international law in the seats of diplomatic agents of foreign States. (Art. 15.)

It is clear from a study of the negotiations preceding the actual signing of the Lateran Treaty that the purpose of the provisions of Article 15 was to compensate in some measure for the extremely restricted area comprising the actual State of the Vatican City, which made it impossible to establish within its boundaries the various seats of Congregations, Offices, Tribunals, etc., indispensable for the government of the Universal Church. The same observation is applicable to the Roman Basilicas mentioned in Article 14, which merited consideration because of their intimate and century-old connection with the spiritual functioning of the Holy See. Hence the Lateran Treaty recognized the special immunity of these localities.

What is included in the phrase "immunity recognized by international law in the seats of diplomatic agents of foreign States," used in Article 15 of the Treaty? According to Oppenheim,[2] the immunity of diplomatic agents is limited to immunity of domicile, exemption from criminal and civil jurisdiction, exemption from subpoena as witnesses, exemption from police, exemption from taxes, the right of chapel and a certain amount of self-jurisdiction. Although all these immunities are sometimes grouped together under the term "extraterritoriality" or "exterritoriality," such a term is simply a convenient legal fiction, for the diplomatic agents are in reality not outside, but inside, the territory of the receiving State. The Italian Court of Rome in the case of *Trenta* v. *Ragonesi*[3] in 1935 held that, although diplomatic immunity was conferred upon certain buildings belonging to the Holy See situated outside the Vatican City, these premises were not to be deemed as

[2] L. Oppenheim, International Law, London, 1937 (5th ed., by H. Lauterpacht), Vol. I, pp. 619–627.

[3] H. Lauterpacht (ed.), Annual Digest and Reports of Public International Law Cases . . . 1935–1937, London, 1941, pp. 235–236; Oppenheim, work cited, p. 620, note 3.

situated outside of Italy so far as to exclude the application of Italian law in an inheritance action.

The privileges included under the immunity accorded to the properties of the Holy See under the Lateran Treaty are an amplification of the use and exemption from taxation and expropriation accorded to the Pope under Article 5 of the Italian Law of Guaranties of May 13, 1871,[4] which was never recognized by the Pope and was specifically abrogated by the Lateran Treaty (Art. 26).

Under Nazi domination, Italy has not always been allowed to respect these immunities. For instance, on the night of February 3–4, 1944, the buildings adjoining the Basilica of St. Paul in Rome were forcibly entered and searched by the Fascist police led by Dr. Pietro Caruso. They forced their way into the buildings, arrested Air General Monti, four other high officers, two public security officials, nine Jews and forty-eight youths avoiding summons for conscription in the neo-Fascist army, all of whom had sought asylum there, confiscated 6,000 (400, says the *Osservatore Romano*) liters of petrol, 300 (41, says the *Osservatore Romano*) automobile tires and 4 trucks, and imprisoned (as unofficially reported) the Rector and his coworkers.

The generally accepted rule of international law on this point is well expressed in the following provision in the Foreign Service Regulations of the United States:

> Premises, which are occupied by a diplomatic representative and members of his staff, either as offices or residences, the goods contained therein, and the records and archives of the mission are inviolable. They cannot be entered, searched, or detained by the local authorities even under process of law.[5]

The actions of the Fascist police, therefore, seem to be violations of the diplomatic immunity of St. Paul's guaranteed by the Lateran Treaty and the Holy See was amply justified under international law in lodging formal protest with the Italian authorities, as it immediately did. It not only could invoke the articles of the Lateran Treaty quoted above, but also could have cited Italian judicial precedents on immunity of property occupied by diplomatic agents. For instance, in 1921, in the case of *Angelini* v. *Government of the French Republic*,[6] the Arbitral Commission at Rome for Leases of Business Premises directed that an investigation be made to ascertain whether property ordinarily used as coach-houses and stables was part of the palace which was the seat of the French Embassy, saying that, if this were

[4] English translation in Herbert Wright (ed.), The Constitutions of the States at War, 1914–1918, Washington, 1919, pp. 347–350; reprinted in Howard L. McBain and Lindsay Rogers, The New Constitutions of Europe, New York, 1922, pp. 561–564; also in MacDonald, work cited, pp. 115–119.

[5] Green H. Hackworth, Digest of International Law, Washington, 1940–, Vol. IV, p. 562.

[6] In Hackworth, as cited.

the case, there would be irrebuttable presumption of the validity of the French defense of jurisdictional immunity.

With regard to the arrest of the 64 persons who had sought asylum in the St. Paul buildings, it might be said that, although the right of asylum on diplomatic property is not universally recognized (for instance, the United States does not sanction it except in extraordinary cases and for temporary periods [7]), it is still a generally recognized rule of international law that the local police authorities may not enter diplomatic property for the purpose of making arrests, at least until the delivery of the fugitives desired has been requested of, and refused by, the diplomatic agent.[8] In point is the provision of Article 22 of the Lateran Treaty whereby the Holy See agreed to surrender to the Italian State—

> the persons charged with crimes, who may have sought refuge in the properties declared immune in Article 15, unless those in charge of such property prefer to invite the Italian agents to enter in order to arrest them.

It may be presumed from the preceding paragraph of the same article that the crimes in question are such "by the laws of both States." In the instant case the Holy See apparently was not even requested to deliver the persons in question nor given an opportunity to pass upon whether they had been accused of acts "considered criminal by the laws of both States" and certainly did not "invite the Italian agents to enter in order to arrest them."

Such violations of diplomatic immunity involve an entirely different question from that of an invasion of the territory of the State of the Vatican City proper, since the latter would be an outright violation of the territorial inviolability of the State of the Vatican City itself. The territorial inviolability of the Vatican City depends upon the neutrality of the State of the Vatican City. Under Article 24 of the Lateran Treaty, "the Vatican City will always and in every case be considered neutral and inviolable territory." Although this is merely an agreement between the Holy See and Italy, all the nations of the world received notice thereby of the perpetual "neutralization" of the State of the Vatican City. Therefore the inviolability of the neutralized Vatican City itself would be guaranteed under the customary rule of international law, confirmed by Hague Convention V of 1907 respecting the Rights and Duties of Neutral Powers and Persons in War on Land.[9] In conformity with this rule President Franklin D. Roosevelt, on July 10, 1943,[10] at the time of the Allied invasion of Sicily, assured the Holy Father that "Throughout the period of operations the neutral status of Vatican City as well as of the Papal domains throughout Italy will be respected."

[7] Hackworth, work cited, Vol. II, p. 622. [8] Oppenheim, work cited, p. 622.

[9] U. S. Treaty Series, No. 540; 36 Stat. 2310; William M. Malloy, Treaties, . . . , Washington, 1910–, Vol. II, pp. 2290–2303.

[10] New York Times, July 11, 1943, Part I, p. 5.

Apart from the Allied bombing, on the morning of February 10, 1944, of the property adjoining the Papal Villa at Castel Gandolfo, which, under Articles 14 and 15 of the Lateran Treaty, enjoys diplomatic immunity, Papal property has been respected by the Allied authorities. In such cases neutral property enjoying diplomatic immunity must accept the fortunes of war, since such immunity does not extend to exemption from bombing by a belligerent of neutral diplomatic property located in an active "theater of war." Under international law, it belongs to the responsible military commander on the scene to determine whether the exigencies of war make such action necessary or convenient. On February 12, two days after the surprise bombing, the Allied Headquarters in Italy announced on the radio, broadcast through the United States, that Castel Gandolfo "now lies in the battle area and contains a heavy saturation of German soldiers." [11] If it were true that German soldiers were on the Castel Gandolfo property this would have been sufficient justification for the military commander to have reached the decision to bomb.

However, on February 17 the Most Reverend Amleto Giovanni Cicognani, Apostolic Delegate to the United States, on instruction of His Eminence Cardinal Maglione, Papal Secretary of State, issued a statement that—

> the report appearing in the press and credited to the Allied High Command, to the effect that the actual territory of the Papal Villa at Castel Gandolfo is "saturated with Germans, therefore subject to bombing," is not true. His Eminence declares that no German soldier has been admitted within the borders of the neutral Pontifical Villa, and that no German military whatsoever are within it at present.[12]

The presence of Germans on the property is a question of fact. Certainly the Vatican authorities, being on the actual spot within the enemy lines, are in a better position to report on this fact and there appears to be no reason for doubting their veracity.

On the other hand, it is not clear from the Delegate's statement whether German soldiers were concentrated in the area, even though none had been "admitted within" the Villa and none were "within it at present." It goes almost without saying that the Axis military authorities would not leave unprotected this direct route from Anzio to Rome.[13] It may have been that the Allied military authorities had some reason to believe that Axis troops were concentrated in the area and might soon have forced their way into the Villa property, strategically located on a hill from which Allied troops on the march to Rome would have been at their mercy, and accordingly decided

[11] New York Times, February 13, 1944, p. 3. [12] Same, February 18, 1944, p. 3.

[13] The Castel Gandolfo property is situated high (435 feet) above the Western shore of Lake Albano 18 miles from Rome and therefore a little over half of the distance (42 miles) from Anzio, the Allied beachhead, to Rome. The railroad connecting Anzio with Rome runs within one half mile of the Castel Gandolfo property and the Via Appia passes by it a short distance to the East.

that the military situation necessitated their taking time by the forelock and removing this potential menace before the Axis "beat them to the gun." If some such thing as this were not true the bombing would not seem to have been justified under international law, while if it were true the bombing, although none the less deplorable, conceivably would have had some justification.

Although one can only speculate on the matter at this distance, it is difficult to see why this property, in which 15,000 persons, mostly women and children, coming from the town of Albano (1½ miles to the south) and the surrounding area are reported to have been accorded refuge by the Holy Father, should have been singled out for bombing. It is no less difficult, in view of the President's assurance, to believe that Castel Gandolfo would have been bombed wantonly and unnecessarily. Nor is it reasonable to suppose that the bombing could have occurred accidentally, since the Villa property is easily identifiable from the air.

On the liberation of Rome, the Holy Father "thanked both belligerents—the Allies and Germany—for having left Rome intact." [14] It was reported that throughout the whole period of the Nazi occupation of Rome—

> No uniforms were ever visible inside the apartments, offices or anywhere [in the Vatican City] but St. Peter's, and that still goes. American and British troops and correspondents in uniform were firmly but respectfully barred by Swiss guards. . . .[14]

On the evidence available, one can agree with the correspondent that the Vatican City "is neutral in fact and spirit." [15]

HERBERT WRIGHT

A BELLIGERENT OCCUPANT'S POWER OVER PROPERTY

No little attention is being devoted by many groups to the problem of property rights in occupied territories. The activities of the German and Japanese armies as belligerent occupants of territory have undoubtedly created a complex of legal problems which will be even more difficult to solve than were those created during World War I.[1] Current and future occupations by the Allied forces may present opportunities for approaching the solutions of these problems but inevitably they will also raise new issues. This comment is not an attempt to suggest solutions for the problems referred to but rather to call attention to the need for bearing in mind the breadth of the powers over private property which a belligerent occupant of enemy territory possesses under international law.

[14] New York Times, June 6, 1944, p. 5.

[15] See additional evidence to this effect in the recent Papal Declaration of Continued Neutrality; below, Supplement, p. 201.

[1] See the declaration of a group of the United Nations, State Department Bulletin, Vol. VIII (1943), p. 21. Cf. Woolsey "The Forced Transfer of Property in Enemy Occupied Territories," this JOURNAL, Vol. 37 (1943), p. 282.

As a broad generalization it may be asserted that the regulations attached to the Fourth Hague Convention of 1907 place two principal restrictions upon the occupant's power to deal with private property: 1) The occupant cannot, in general, take private property merely for the purpose of his own enrichment; 2) The occupant cannot deprive a private owner of property without compensating him. Both of these generalizations are subject to qualification.

From a different point of view it may be said that the Hague Regulations make it possible for a belligerent occupant to take property if he requires it for the purposes of his occupation.

In respect of private property there are five ordinary actions which the belligerent occupant can take affecting the possession or ownership of that property. These methods are 1) destruction; 2) seizure with duty to restore and indemnify; 3) seizure and confiscation; 4) requisition; and 5) purchase. These may be considered in turn.

1) Destruction. This is obviously not a method whereby the occupant acquires the property for himself but it is a method whereby the private owner is deprived of his property. It may lawfully take place in the course of military operations, as, for example, by bombardment or shell fire in case the property is held by enemy forces remaining within an area which is under occupation. It might also occur in case of the clearing of a line of fire for the purpose of defense in the face of enemy attack or in exploding land mines or booby traps. Other situations might well arise justifying the same kind of action. Assuming the proper justification for the act, the owner will not be indemnified in these cases any more than he would be in the familiar cases where his property happened to lie in the line of fire between two fighting forces. The occupant is, however, subject to the general duty to take care to preserve works of art, historic monuments, and similar cultural property.

2) Seizure with duty to restore or indemnify. According to paragraph 2 of Article 53 of the Hague Regulations, there is a category of private property which the occupant may seize, subject to an ultimate duty either to restore with indemnification or to indemnify at the conclusion of peace. As the Proceedings of the Second Hague Conference show, this paragraph, which is preceded by the paragraph specifying the right to seize enemy public movable property which has a military use, was designed to indicate that the articles mentioned in the second paragraph were also of military use.[2] In the case of the private owner, however, his ultimate right to compensation is recognized. The types of private property here included are specifically arms and munitions and means of communication and of transport, e.g. wagons, automobiles, trucks, canal boats, telephones, radios. The law does not require that the occupant in seizing this property give a receipt, but equity requires one in view of the owner's right to make a subsequent claim

[2] Proceedings of the Hague Peace Conferences, Translation of Official Texts, Carnegie Endowment for International Peace, Washington, 1920: Conference of 1899, p. 431.

which he would be quite unable to substantiate in most cases unless a receipt were given. In practice this form of receipt should be differentiated from that given for requisitioned articles, as mentioned hereafter. The Hague Regulations do not place limitations upon the use which may be made of articles of this character seized by the occupant. Because of their military use it seems to be assumed that they will be taken and pressed into immediate military service, but there would be no violation of law if the occupant seized the property and shipped it back to his own country, as to relieve a shortage of farm transport. However, the occupant does not get title to such property.[3] In this respect also the situation is different from that in case of requisitions.

3) Seizure and confiscation. This case is not spelled out in the Hague Regulations but it is important. Private property of any kind may be forfeited as a penalty. For example, a military regulation may forbid civilian carts to cross a certain bridge under penalty of forfeiture of the cart and its contents and the draft animal. A regulation may forbid the sale of intoxicating liquors under penalty of forfeiture of all stocks on hand. Especially in agrarian communities of rather primitive economy, fines may be imposed in terms of farm produce, articles of native manufacture, or any other commodities. Property taken by the occupant in this way is acquired with a clear title and may be used in any way the occupant sees fit.

4) Requisition. This familiar military process of acquiring needed supplies is regulated in detail by Hague Regulation No. 52. The category of private property involved is tested by the need of the army of occupation for its own maintenance. Thus it includes food, fuel, houses for billets, gasoline, cloth for uniforms or blankets, leather for boots, tobacco, and, for the armies of many countries, wines, beer, or liquors. (Services also may be requisitioned but only property is considered here.) The procedure prescribed requires that an order be secured from the commanding officer of the locality. This need not be a person of high rank; the purpose is to fix responsibility and place a check upon the individual soldier's tendency to loot or acquire "souvenirs." This requirement also would be necessary to enable the occupant to comply with the further stipulation that he can take only in proportion to the resources of the country. The occupant is required to pay cash for property requisitioned. As an exception to this rule he may if necessary give a receipt which is to be redeemed in cash at the earliest possible moment. The receipt is obligatory if cash is not paid and it constitutes in a sense a form of deferred payment.[4] The requisition is thus a form of forced sale. Since requisition may not be used except for the needs of the army of occupation, it would be illegal to requisition property which the oc-

[3] Same, p. 558.

[4] The importance of the receipt is stressed in Laurent v. Le Jeune, decided by the Belgian *Cour de Cassation* on March 3, 1921; Williams and Lauterpacht, Annual Digest, 1919–1922, Case 343.

cupant wished to send out of the occupied territory for use elsewhere. It would also be illegal to requisition for the needs of the civilian population even though the contrary might be argued from the duty of the occupant to preserve order and to sustain the local needs; other means are to be found for this purpose.

5) Purchase. Military experience has frequently demonstrated the fact that if an occupant's chief objective is to secure for his troops food or other local supplies which the people of the area possess, he may find it advisable to waive his right to requisition and to seek by attractive prices to induce the inhabitants to sell in open markets. This has been reiterated by military men but never more effectively stated than by that staunch defender of military interests, Col. von Schwartzhoff, German military expert at the First Hague Conference.[5] The Colonel pointed out that this procedure involved for the occupant a need for cash; the raising of cash by taxation, contributions, and other means is not dealt with here.

In addition to these ordinary methods of acquiring private property the occupant has a most important general power which he enjoys by virtue of the fact that he stands for purposes of local government in the shoes of the legitimate sovereign. He has the legislative power and may exercise it subject to respect for the various restrictions which international law imposes upon an occupant, including the duty under Regulation No. 43 to respect "unless absolutely prevented" the local law in force. This last stricture refers in general to the normal body of civil and penal law governing the usual day to day relations of the people of the community. In general it is not applicable to the public law of the community. The law of most communities gives to the state the power to deal with private property for public purposes; it will be recalled that the subject was much discussed in connection with the controversy between the United States and Mexico relative to the expropriation of oil properties.[6] In at least a large number of countries the law requires that the state compensate the individual if his property is taken, but if the law does not so provide the occupant is not concerned so far at least as nationals of the occupied country are concerned. The local law may give the government power in an emergency to fix prices, to forbid hoarding, and, indeed, to regulate in a thousand ways the economic life of the community. Current experience in the United States is illustrative.

The normal rôle of an occupant in exercising the power of the state to deal with private property for a public purpose is well illustrated by the case of Marjamoff and others v. Włocławek, decided by the Supreme Court of Poland on December 5, 1924. According to the record the facts in the case were as follows:[7]

[5] Proceedings of the Hague Peace Conferences, as cited, p. 528.

[6] E.g. Chandler P. Anderson, Inviolability of Private Property against Confiscation, 1927.

[7] Annual Digest, 1923-24, Case No. 243. The note in the Digest refers to an adverse comment by Rundstein.

> "A decree of the German Governor-General of those sections of the Russian part of Poland which were occupied by the German troops since 1915 introduced certain changes in the law concerning expropriation for reasons of public utility; in particular, the decree authorized the Governor-General to order such expropriation where formerly it could only have been ordered by the Russian Emperor. On June 26, 1918, the German Governor-General authorized the Communal District of Włocławek to carry out the expropriation of certain property belonging to the plaintiffs in order to extend the district hospital; the Commissioner of Włocławek, in January, 1919, made an order for expropriation against payment of a certain sum. The plaintiffs, who contended that the decree of the Governor-General was invalid, sued the defendants before the District Court of Włocławek for higher compensation. . . ."

The Supreme Court held that the decree of the German Governor-General was valid. It noted that the change in the law was merely procedural and therefore allowable. It apparently did not question the right of the occupant to exercise the power of expropriation.

Obviously this power of the occupant to enact and to act under emergency legislation is subject to abuse, as are the other powers of an occupant. One returns to the broad generalizations at the beginning of this comment. If the occupant acts in good faith for the management of the community under war conditions and not for his own enrichment, and if the rights of the individual owner under local law are respected, the occupant's action has a solid basis in law.

PHILIP C. JESSUP

CURRENT NOTES

INTERNATIONAL ASPECTS OF LEGAL AID

Among the host of challenging problems for the post-war period is that, arising in the field of private international law, of providing free legal service to a poor client in Country A, the solution to whose problem lies in whole or in part in Country B. Even though specific figures are not available,[1] the number of such cases prior to the present war was not negligible. One may assume that, with the widespread disruption of population due to military activities, the post-war volume of such situations will be greater rather than less. The nature of the clients' difficulties which require such aid covers the whole area of human misery for which the resources of the law are effective in supplying a solution.[2]

The movement to provide poor persons with the "equal protection of the law" is known in the United States as legal aid work.[3] In other countries similar local systems are not entire novelties.[4] Post-war establishment of local legal aid work in each of the various countries affected by the present

[1] In the United States the Standing Committee on Legal Aid Work of the American Bar Association annually publishes figures showing the volume of legal aid applications in this country. At present they exceed 250,000 a year. Unpublished records in the office of the National Association of Legal Aid Organizations break this total figure down into source, nature and disposition. A study of reports of individual legal aid societies would reveal much regarding the international cases handled.

[2] The National Association of Legal Aid Organizations in 1923 adopted a uniform classification of information regarding cases and clients. These figures, still unpublished, are grouped under seven major headings: cases growing out of contractual relations; torts; cases growing out of property; estates; domestic relations; criminal matters; unclassified. The reader should note that most statistical information about legal matters is available from court records. The legal aid material shows us what happens in the law office. About 90 per cent of legal aid matters never get into court.

[3] The movement in the United States is described in Smith and Bradway, "The Growth of Legal Aid Work in the United States," Bulletin 607, U. S. Bureau of Labor Statistics, 1936. A more recent survey is "Frontiers of Legal Aid Work," Annals of the American Academy of Political and Social Science, Vol. 205 (Sept., 1939).

[4] In England recent material includes: J. Mervyn Jones, Free Legal Advice in England and Wales, 1940; E. J. Cohn, "Legal Aid for the Poor," in Law Quarterly Review, Vol. 59 (1943), p. 250. The Poor Person's Committee of The Law Society publishes an annual report, thanks to the industry of its Secretary, A. Hassard-Short. Recent material in other countries is not so readily available. The Bombay Law Journal published many interesting reports and accounts. In Germany there was much activity: H. B. Davis, "The German Labor Courts," in Political Science Quarterly, Vol. 44 (1929), p. 397. David W. Wainhouse, "Legal Aid in the German Social Welfare Program," in The Legal Aid Review, Vol. 32 (1934), p. 1. Of a more general nature are: Sidney B. Jacoby, "Legal Aid to the Poor," in Harvard Law Review, Vol. 53 (1940), p. 940. Sinclair Shaw, "International Aspects of Free Legal Aid," in Scottish Law Review, Vol. 52, p. 203. Robert E. Stone, "Certain European Legal Aid Officers," in California Law Review, Vol. 25 (1936), p. 52. This list is not intended to be more than illustrative.

conflict and the continuing improvement of such systems everywhere will present absorbing problems. But the question to which this memorandum is addressed is that of creating suitable international legal aid machinery to permit the transfer and dispatch of such legal affairs from one country to another with a minimum of expense, delay and cumbersome red tape and in such manner that reasonably comparable results may be obtained.

An illustration may serve to clarify the nature and extent of the present problem. Let us suppose that a client in Durham, North Carolina, U. S. A., has a difficulty which he thinks requires the services of a lawyer. As he is without funds he must find someone who will do the work for nothing. The Duke University Legal Aid Clinic renders just such service. Our hypothetical client learns of this organization by common gossip and comes to my office. If no such organization happened to exist, he would have to hunt some lawyer in private practice who might be willing to help him. He tells me his story and I decide it is a matter within the jurisdiction of my office. The man cannot pay a fee; the claim has reasonable legal merit.

If the solution appears to me to lie in Durham County I have available the local legal tools. If I possess the requisite skill, I may, within the customary restrictions of law and professional ethics, proceed to render the desired service. Irrespective of the content of the problem this is the simplest form in which it can come to me. If, on the other hand, part of the solution lies in another county of the state, I have the further obstacle of distance. If the matter is to be handled in some other state, I must cope not only with distance but with a legal system somewhat unfamiliar to me. When the solution lies in some other country, the additional difficulties of differences in language, legal concepts, judicial systems are obvious.

To surmount these inter-state or international obstacles and solve the client's problem to the best of my ability, I need certain administrative machinery. In particular cases I may need more; but a minimum would seem to consist of some way of obtaining a competent and reliable person in the other jurisdiction who will do there what needs to be done, some method of reaching a common understanding with this competent and reliable person on the various decisions which must be made as the case proceeds, and some way of evaluating the service rendered so as to meet any objections or criticisms which may be made to the eventual solution, justifiably or otherwise.

To build up and maintain a list of competent and reliable persons in the various countries is a task which would consume so much time and be so expensive that it seems to lie beyond the capabilities of the average individual.[5] To establish a meeting of the minds between two persons separated

[5] As an indication of the difficulty encountered in compiling lists of lawyers even in this country the reader should consult the Proceedings of the American Bar Association Committee on Law Lists, and, in particular, No. 43 of the Canons of Professional Ethics Rules on Law List Standards; Journal of the American Bar Association, Vol. 29 (1943), p. 474.

by distance and other obstacles, on the details of a particular case, may also require highly specialized aid beyond mere individual correspondence. A knowledge of the resources which the law in the other country affords in such situations, translation service, and a means of following up a case to see what has happened, are typical examples. To secure agreement to, and to maintain, minimum standards for the conduct of such far-flung transactions is also a matter for general rather than individual action.

We are not without information as to earlier efforts to deal with this situation. Among the informal programs in effect mention may be made of the manner in which such requests for aid are handled among the various states of the United States,[6] and the coöperation in such matters between England and the United States during the past few years.[7] These examples, while adequate in themselves, are hardly typical of global conditions. We should not rely too heavily upon them in dealing with cases where the coöperating parties do not have advantages such as a common language, reasonably similar legal concepts and legal procedures, and local bar associations which require at least minimum standards of ethical conduct and efficiency.

Examples of the more formal method of dealing with this situation are contained in various treaties, conventions, and agreements.[8] These may be

[6] The rules adopted by the National Association of Legal Aid Organizations for the handling of cases referred from one member society to another are available in: National Association of Legal Aid Organizations, "Legal Aid Standards and Records," 1940: Chapter XIV. Rules Regarding the Charging of Fees in Cases Handled between Two Societies; Inter-Society Relationships: p. 468.

[7] One of the present writers was for years Secretary of the National Association of Legal Aid Organizations. In that capacity he had occasion to correspond frequently with Adrian Hassard-Short, Secretary of the Poor Persons Committee of the Law Society in London, both sending and receiving problems. The procedure involved merely a letter containing a statement of the facts and the desired action. Occasionally a copy of a court decree or an affidavit was necessary. Frequently an opinion as to the applicant's legal rights sufficed. See: David W. Wainhouse, "Protecting the Absent Spouse in International Divorce," in Law and Contemporary Problems, Vol. II (1935), p. 360; the same, "Some Legal Aspects of International Case Work," in The Family, Vol. 14 (1933), p. 245; Charles Zunser, "Family Desertion: Some International Aspects of the Problem," in Social Service Review, Vol. VI (1932), p. 235; "Desertion of Wives and Children by Emigrants to America," in Journal of the American Institute of Criminal Law & Criminology, Vol. 4 (1914), p. 443.

[8] The initial effort to collect this information was made as a result of an international meeting of experts in Geneva in 1924. The results are embodied in League Document V Legal 1927 V 27 ("Legal Aid for the Poor)". Descriptions of this meeting may be found in: "International Arrangements for Legal Assistance for the Poor," Report by the Secretary General of the League of Nations to the Assembly, Legal Aid Review, Vol. 23 (1925), p. 1; "Legal Aid and the League of Nations," Massachusetts Law Quarterly, Vol. 10 (1925), p. 92; Memorandum of the Fourth Assembly of the League of Nations, International Arrangements for Legal Justice for the Poor, Legal Aid Review, Vol. 22 (1924), p. 9; John H. Wigmore, "League of Nations Conference on Legal Aid," in Journal of the American Judicature Society, Vol. 7 (1923), p. 133; Report of the Legal Aid Committee of the American Bar Association, 50 Reports of the American Bar Association, Vol. 50 (1925), pp. 451, 452; Reginald Heber Smith, International Legal Aid Work, in Annals, Vol. 167 (1926).

divided into two categories: the many agreements dealing with the subject concluded before and after 1905 and the Convention Relating to Civil Procedure, signed at The Hague on July 17, 1905.[9] A perusal of the texts of these agreements will reveal that the draftsmen are, in general, concerned with such matters as the following: the persons who shall be entitled to free legal aid,[10] the determination of eligibility for legal aid,[11] and provision for security and costs connected with the conduct of legal proceedings.[11a]

Excellent as these earlier efforts are, they do not go far enough.[12] The post-war opportunities in dealing with such administrative matters as these point to the need for an organization operating internationally and charged with specific responsibilities and definitely limited against encroachments upon areas of local activity. It is submitted that there should be an international clearing house; otherwise what is everybody's business will tend to become nobody's business. The mere mention of an international clearing house raises two further questions: how should it be set up and maintained; and what functions would it be expected to perform? The first of these questions can hardly be answered finally until the shape of the international structure of the post-war world is more generally known.[13] But as to the second question, certain features are already clear.

[9] British and Foreign State Papers, Vol. 99, p. 990.

[10] As in Article 5 of the Declaration Concerning Free Judicial Assistance and the "Cautio Judicatum Solvi," accompanying the Convention of Establishment of April 25, 1934 between Persia and Switzerland (League of Nations Treaty Series, Vol. 160, pp. 173, 183).

[11] Illustrated in Articles 6 and 7 of the Convention Concerning Certain Judicial Questions of July 2, 1930, between Belgium and Bulgaria (League Treaty Series, Vol. 130, pp. 191, 197).

[11a] As in Articles 1 and 2 of the Convention Regarding Mutual Assistance and Legal Protection in Civil Matters of December 19, 1929, between Poland and Roumania (League Treaty Series, Vol. 130, pp. 205, 207, 209; *cf.* also Article 8 of the Convention Regulating Reciprocal Judicial Assistance in Civil and Commercial Matters of March 30, 1934, between Greece and Switzerland (League Treaty Series, Vol. 185, pp. 245, 251).

[12] "Legal Aid for the Poor," note and supra indicates the steps taken at the 1924 Geneva meeting.

PART I. "Laws, Regulations and Treaty Provisions Regulating Legal Aid in Certain Countries" (a matter of information).

PART II. "List of Agencies for Legal Aid Established in Certain Countries" (a step toward this list indicated in the text of the present article).

PART III. "List of Authorities or Persons Appointed in Certain Countries to Answer Inquiries from Abroad" (a step toward a procedure for the transmission of cases).

This list of steps taken, while certainly a memorable advance, merely points the way to desirable further action, including a continuing information service, a current list of eligible persons, and possibly aid in helping some countries establish their own internal system.

[13] Financial support, and therefore potential control, regarding legal aid work comes some times from the public treasury and at other times from private sources. Both types of agency have enviable records but neither is as yet so far superior to the other as to warrant adopting an exclusive means. In theory the administration of justice is a public function and the lawyer is a quasi-public servant. In practice the experimentation which should precede the creation of a public institution is better handled by a private agency. Politics affects all public institutions. Lack of money retards the privately supported agency. If a way could be found to combine the availability of public finances with control and policy-

The international legal aid clearing house should be a source of information. In this aspect it would compile periodically and maintain lists of competent, reliable persons in each country who would be available to handle cases. Whether such designated persons would have political or professional affiliations would depend upon local conditions. Perhaps it is premature to be dogmatic but it should be remarked that there is a continuity in professional standards which we ignore at our peril. Another type of information to be gathered would be the resources of the law in the various countries for dealing with human problems. This should be something more than a collection of statutory material; rather it should be a compilation of practical suggestions as to how particular results may be achieved, the various agencies whose aid may be solicited, and many other such details which seem barren and tedious until one is confronted with an actual situation requiring prompt action.

A second function of such an international agency would appear to be to aid in the solution of specific legal aid cases. After the lists of competent and reliable persons had been compiled there would be a desirable tendency in the interest of speed for correspondence direct from one country with another. But at least for a time, while the plans were being worked out, there would be a number of cases in which special aid might be required in translation, explanation, and a thousand and one other such details.

A third function of this international agency would be to provide a forum for the periodic discussion and adoption of reasonable minimum standards for the conduct of the work and appropriate safeguards to reduce the number of possible criticisms.

Whether such an international agency should have any authority to police the work within the boundaries of a given country is a matter deserving discussion. The degree of regimentation to which a particular people will submit is still a subject on which there may be vigorous disagreement. One should not underestimate the difficulty of maintaining standards even after they are agreed to. The resources of the law in one country may not be comparable to those in a neighboring jurisdiction. If the initial standards are placed too high the result may be to discourage the whole enterprise. Yet in spite of difficulties some minimum standards would seem justified. It is reasonable, for example, to urge that the term "legal aid work" should have a certain basic meaning everywhere, in terms of promptness, provision for expenses, methods of determining whether a person is or is not a legal aid client. Even uniform record-keeping might find a place in this part of the work.

The specific purpose of this memorandum is to point out a problem and to suggest a remedy. The problem is to develop for post-war use a more

making by a professional agency such as a Bar Association considerable benefits might be expected. One such plan which still remains to be implemented appears in the State of Washington: Reports of American Bar Association, Vol. 64 (1939), pp. 226, 235.

effective method of handling legal aid cases where complainant calls for redress in a country other than the one in which he comes for help. The proposed solution is an international organization with specific authority to gather information, facilitate the handling of cases, and provide a forum for the discussion of mutual difficulties such as the development of minimum standards for the conduct of the work.[14] It is not too soon to begin planning for a meeting of experts similar to the one which met in Geneva in 1924. Such a group may well consider the drafting of an international convention to supplement The Hague Convention of 1907 and provide a new point of departure.

JOHN S. BRADWAY
ALONA E. EVANS

TRAINING FOR AMERICAN A.M.G. OFFICERS

The training of Civil Affairs Officers for Allied Military Government (AMG) duties has been given much thought and consideration by the United States Army during the present war and has led to the establishment of a special and comprehensive training program at the School for Military Government at Charlottesville, Va., and in ten American universities—Boston, Chicago, Harvard, Michigan, Northwestern, Pittsburgh, Stanford, Western Reserve, Wisconsin and Yale. While the European phase of this extensive program came to an end early in 1944, presumably because the quota of officers with European area training had been filled, the University of Chicago is continuing its Far Eastern program and is expected to be joined in the near future by other schools which will specialize in the same field.

These so-called Civil Affairs Training Schools (CATS) were headed by civilian directors. The instruction was carried on under directives from the Training Branch of the Military Government Division of the Provost Marshal General's Office. The schools were set up in the Summer and Fall of 1943 at universities which were in a position to provide the necessary staff from their own faculty plus, perhaps, some neighboring institutions, or were located in metropolitan centers where they could call on a large reservoir of foreign-trained and experienced talent. Training terms ranged in length from eight to twelve weeks for the European program to seven months for work on the Far East.

The Civil Affairs Training Schools were preceded by the School for Military Government, set up in May, 1942 under the direction of Brigadier General Cornelius W. Wickersham and continuing its work with enlarged enrollments.

The officers selected for Civil Affairs training first received a month's special training at the Training Center of the Provost Marshal General at

[14] No doubt when one comes to attempt to draft the text of a convention suitable for the creation of the proposed international legal aid clearing house the experience of the League of Nations in this respect will be helpful.

Fort Custer, Michigan, in the following fields: army organization, tactics, and staff work; police and security; government. This work included instruction based on the recently revised Field Manual 27-5, entitled *Joint Army-Navy Manual of Military Government and Civil Affairs*, dated November 4, 1943, which supersedes the Field Manual 27-5 issued in July, 1940.

At first all officers (nicknamed CATS themselves) selected for Civil Affairs training were civilians commissioned for this particular purpose—men who had long training and experience in one or more of the following fields: government administration, finance, education, public welfare, public works and utilities, communications, public health, public relations, public safety, and economics. They included mayors, deputy and attorney generals, local, state and federal officials of various kinds, professors, public school administrators, lawyers, bankers, railroad men, public utility and public health men, etc. Later selection was confined to men who were already army officers in the various branches of the service. In rank the officers in the Civil Affairs Training Schools ranged from second lieutenant to lieutenant-colonel and at Charlottesville from captain to colonel. Their upper age limit was fifty-four years, which was higher than for corresponding work in the British army.

The training consisted of three parts: (a) knowledge of the characteristics and of conditions prevailing in certain areas; (b) instruction in certain languages (mostly German, French, and Japanese); and (c) application of professional and technical knowledge to military government situations. All instruction was to be thoroughly integrated.

The areas studied in the European phase of the program included Germany and Italy and many of the countries occupied by Axis forces. The areas were not the same in each university or, necessarily, the same from term to term in a given school. Chicago's program includes Japan and related areas. In the ten universities mentioned emphasis was placed on area knowledge rather than on military government (as far as it is possible to separate the two fields) while at Charlottesville, with a longer term, greater stress was laid on military government, with area studies spread widely over the globe rather than being confined to more concentrated areas. Central Europe, including Germany, Austria, and such areas bordering upon the Reich as might be essential for a satisfactory treatment of a German problem or situation, received considerably more attention than the other areas, especially during the later terms of the program.

Area instruction consisted of lectures, conferences, discussions, supervision of problems and projects and any other type of activity which might lend itself to the instructional purpose, such as interrogation of foreign-born informants or group work on speciality problems in which the area knowledge is linked up with the use of the civil affairs specialities in military government.

The subjects which were stressed in the case of each country were (a) local government (with emphasis on its organization and services); (b) the judicial

and law enforcement systems; and (c) the economic systems, including industry, commerce and agriculture.

Some of the chief questions to be answered were, to quote a few from many examples: (1) What is the usual administrative staff and functional personnel organization for villages, towns, cities, districts or regions? (2) What members of the existing governmental organization can be trusted? What non-governmental officials might give worthwhile assistance to AMG? (3) What is the method of selection and tenure of judges? What is the general reputation of the judiciary? (4) What is the organization of the police? their recruitment? their characteristic methods? character of the laws of the country? (5) What is the machinery for collecting taxes, providing relief, controlling public health, public works, education? (6) What are the principal types of land transportation? (7) What is the source of the milk supply and how is it marketed? (8) What are the bathing habits of the population? (9) Through what groups, organizations or individuals may useful contacts be established for the purpose of gaining the coöperation of different social classes and religious groups—in cities, in rural communities?

Much attention was paid to the kind of knowledge and points of view which would help the CAO (Civil Affairs Officer) to understand the people with whom he must deal and to meet effectively the problems which he was likely to encounter in the course of his AMG duties. These needs called for special attention to the study of national psychology, political customs and philosophies, religious convictions and outlooks, inherited attitudes, patterns of thought acquired under the monopolistic propaganda of Nazism, recent history, etc.

A special effort was made to bring the officers into contact with members of the pertinent nationalities, an endeavor not always very profitable because of Americanizing influences effective to some extent even upon the most insistently foreign people.

The faculty consisted of a combination of academically trained people who were specialists, *e.g.* on German local government, the Nazi Party, farming or education, and men with business, professional, or "residence" experience in the respective foreign countries. There were a good many refugees and voluntary emigrants of many and diverse types among them, including some who had received their training in Hitler Germany in recent years, as well as American students of affairs, businessmen, etc. A special effort was, of course, necessary to tie up these various types of knowledge and experience into a whole understandable to the average officer who had never thought of Germany in terms of problems confronting him personally.

Languages, primarily German, French and Japanese, were taught mostly by the recently developed methods of intensive language training, with the help of small drill sections headed by native speakers of the language. The results ranged from excellency in language proficiency for daily needs to

openly expressed gratitude for orders to leave the school early for overseas duty, thereby ending training in what Mark Twain called "that awful German language."

While the American army has had a good deal of experience in military government—ranging from the Philippine Islands to Cuba and Puerto Rico, and from our own southern states in the Civil War to the Rhineland, previous occupations had been undertaken with little thought given to the special problems involved. The current Civil Affairs Training program marks the first time that the American army has deliberately set out to prepare a large number of officers for special duties and problems connected with the AMG program. It is, of course, too early to judge the results of this schooling, although a large number of officers have written expressing satisfaction with this or criticism of that part of the training program in the light of their experiences. If any general idea emerges from this correspondence it is that the CATS' appreciation of the opportunity for special training increases in proportion to their nearness to the theater of arduous AMG operations.

JOHN BROWN MASON

ONCE AGAIN: LOCAL PRIORITIES IN BANKRUPTCY

Unilateral introduction of a priority rule in the bankruptcy law of any country favoring local creditors at the expense of non-residents is a type of legislation bound to create repercussions abroad. One may wonder if those responsible for the legislation are always aware of the implications which such an act can have on international relations.

A new case has now been added to the long list of local priority rules. Mexico has adopted a new bankruptcy law modernizing her former legislation in this field. The new Bankruptcy Act of December 31, 1942,[1] a legislative achievement of high quality in general, provides, as did the old law,[2] that the Mexican branch of a foreign establishment can be declared bankrupt in Mexico, notwithstanding the bankruptcy jurisdiction of any foreign state. When such a branch is declared bankrupt in Mexico, according to the new Act, Section 13 (3), the bankruptcy affects the assets in Mexico and all claims resulting from transactions with that branch. The general creditors of the establishment, therefore, do not share in the liquidation of the assets located in Mexico.

One of the fundamental principles of bankruptcy law in all legal systems is the rule of equality among creditors. The equality rule is violated if the general creditors of the same debtor cannot participate in the liquidation of all his assets wherever located. Should transfer of assets into another country lead to the result that these assets are not longer available to the general creditors the tendency would be to refrain from effecting such transfers. Intercourse between nations would be proportionately reduced.

[1] *Diario Oficial* of April 20, 1943. [2] *Código de Commercio*, § 949.

The mere operation of an establishment, a branch, or an agency in a foreign country does not justify the local discrimination, as long as no separate legal entity is created. In the absence of a separate legal entity the presence alone of assets in the country in which a branch is operated is not sufficient, under general principles of law, to reserve these assets exclusively for the creditors of the branch.

Dr. Joaquín Rodríguez Rodríguez, leading commentator and codrafter of the new Mexican Bankruptcy Act, states in justification of the new provision that national and foreign creditors in a Mexican bankruptcy are to be protected by it against limitations which may derive from the principle of territoriality adopted by other foreign legislations.[3] It is true that local priority rules are in force in certain countries of South America.[4] Argentina, Paraguay, Peru, and Uruguay, for example, give a priority to local creditors on local assets in the case of concurrent bankruptcies, i.e., when bankruptcy is declared abroad as well as at home. This rule is the subject of much international controversy today. Brazil provides the same priority, but only when the establishment declared bankrupt in Brazil is a separate and distinct entity.

There is no local priority rule in the United States [5] or in English bankruptcy law, or in the bankruptcy law of the Civil Law countries of Europe. As far as these countries go any justification for the introduction of the priority rule in Mexico is lacking. If the purpose of the new provision is the protection of creditors in Mexico against the effects of foreign local priority rules the provision as it stands goes beyond that goal. It would have been sufficient to give the rule the character of a reciprocity measure.

Local priority rules have always been a source of difficulties. While they have entirely disappeared in Europe they still exist in some parts of the Western Hemisphere although the advisability of their maintenance is questioned by groups within the countries concerned. In the interest of undisturbed commercial relations Inter-Hemisphere agencies and organizations, like the Permanent Committees created by the International Conferences of American States, the Inter-American Bar Association, the Permanent Council of American Associations of Commerce and Production, should try to obtain uniformity of legislation on this important matter.

KURT H. NADELMANN

[3] J. Rodríguez Rodríguez, *Ley de quiebras y de suspensión de pagos* (1943), p. 29.

[4] See K. H. Nadelmann, "Foreign and Domestic Creditors in Bankruptcy Proceedings: Remnants of Discrimination?", in *University of Pennsylvania Law Review*, Vol. 91 (1943), p. 601. Cf. Mestre Sirvén: Book Review, *Revista de Derecho Internacional*, Havana, Vol. 44 (1943), p. 280.

[5] State law priorities are ineffective in bankruptcy proceedings: Federal Bankruptcy Act, as amended in 1938, § 64 (a) (5).

POPULARIZATION OF INTERNATIONAL LAW

In *The New Yorker* for February 19, 1944, and again in the same publication for the following week, on February 26, appeared two items relating to international law.

In the first it was argued that national foreign policy, based on self-interest, is proper only in a condition of anarchy, or absence of international law ("constitutional world law"), and the freedom of action resulting therefrom. It was argued, and this paradox was the only trace of anything flippant in the item, that it should therefore be "*the policy of the United States* (italics in the original) *to bring to an end the use of policy*,"—obviously by complete regulation of the lives of the peoples by international law,—as a matter of common sense, decency, and self-interest. It was admitted that promotion of such a program would be difficult.

Students of international order will recognize the familiar problem and will, presumably, welcome the essentially sound position taken by the writer in Talk of the Town. At the same time they will be moved to demur to the extravagant hopes cherished for the possible development of international law. It would have to be said to the unknown seer that under no system of law, international, national, or local, are individual or group interests ever regulated so completely that there is no room left for policy. Nor would such complete regulation be possible or desirable. Desirable or undesirable, it would be dangerous to hold out such illusory prospects for the development of law and order. Finally, such a development would lead straight to world or international totalitarianism just in proportion as it was realized. Having said that, however, the supporter of international law could well go on to acknowledge and insist that it is, indeed, precisely an extension of international law which is needed to cut down the *proportion* of the field of international relations covered by mere policy, and that the writer in *The New Yorker* is a welcome collaborator in that enterprise.

The second item describes the situation in this country respecting prisoners of war and recites numerous provisions of the Geneva Convention concerning their treatment. It is detailed, accurate, and also contains only one suggestion of comedy—a reference to Mayor La Guardia.

Again it seems worth while to note these references to international law in a very popular humorous periodical, albeit one which (as is well known) contains much expert and distinguished writing on music, art, literature, and other matters. Students of international law should rejoice over this phenomenon, given also the fact that the treatment of the subject is so competent, not to say serious. The body of readers of *The New Yorker* probably occupy a more strategic position in the formation of current opinion than those of the so-called learned journals. Students of international law and politics also should stand ready to aid in such wise "popularization" of their discipline under suitable circumstances.

P. B. P.

MEETING OF THE INTER-AMERICAN BAR ASSOCIATION

The third conference of the Inter-American Bar Association will take place in Mexico City on July 31–August 8, 1944. The American Society of International Law is a member of the Association and the President of the Society was authorized at its last meeting to appoint delegates to the forthcoming meeting.

The Inter-American Bar Association was founded in Washington on May 16, 1940, at the Eighth American Scientific Congress. Its purposes are:

> To establish and maintain relations between associations and organizations of lawyers, national and local, in the various countries of the Americas, to provide a forum of exchanges of views.
>
> To advance the science of jurisprudence in all its phases and particularly the study of comparative law; to promote uniformity of commercial legislation; to further the diffusion of knowledge of the laws of the various countries throughout the Americas.
>
> To uphold the honor of the profession of the law; and to encourage cordial intercourse among the lawyers of the Western Hemisphere.
>
> To meet in Conference from time to time for discussion and for the purposes of the Association.

The First Conference met at Havana, Cuba, on March 24–28, 1941. The Argentine Federation of Bar Associations invited the Association to hold its second conference at Buenos Aires in September, 1942, but this meeting had to be cancelled due to the war and the difficulties of obtaining transportation. In its place the Council and committees of the Association met in Washington on November 19–21, 1942. The second conference was held at Rio de Janeiro on August 7–12, 1943.

Bar associations of the following countries are now members: Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Panama, Paraguay, Peru. The United States is represented by the American Bar Association, sixteen State and local associations, and ten special legal associations.

Members of the American Society of International Law are eligible to attend the meeting at Mexico City. Information may be obtained from the headquarters of the Inter-American Bar Association, 336 Southern Building, Washington 5, D. C.

G. A. F.

EGYPTIAN SOCIETY OF INTERNATIONAL LAW

Upon the initiative of Mr. Jasper Y. Brinton, President of the *Cour d'Appel Mixte* at Alexandria, Egypt, for many years a member of the American Society of International Law and a contributor to its JOURNAL, there has been founded an Egyptian Society of International Law modeled as closely as practicable upon its American prototype. The object of the new Society is stated in the following paragraph:

> The object of the Society shall be to encourage the study of public and private international law in Egypt and to promote the establishment of international relations on the basis of law and justice. In furtherance of these ends the Society will seek to maintain contact with similar organizations throughout the world, with a view to the friendly exchange of opinions and an active coöperation in efforts to bring about uniformity of agreement in matters touching international law. Its activities will include the holding of meetings, the organization of lectures, the publication of a periodical journal and other papers, and in general such other undertakings as may from time to time seem best suited to further the cause of international law and to make available to students throughout the world the full resources of Egyptian jurisprudence and legal science in that field.

Judge Brinton was encouraged in his efforts by the Minister of Justice, Mohamed Sabry Abou Alam Pacha, who accepted the Honorary Presidency. The President is Amine Anis Pacha, *Président de la Cour de Cassation Nationale.* The affairs of the Society will be managed by an Executive Council elected for a three-year period. The present membership is predominately Egyptian, in keeping with the primary purpose to make the Society a source of encouragement to Egyptian students. Judge Brinton is one of the few non-Egyptian members of the Council. Provisionally, the seat of the new Society is the Law Faculty of the new Egyptian University named after the present King, Farouk I.

The American Society of International Law extends cordial greetings to its new associate in Egypt and its best wishes for a long and successful career in promoting their common objectives. The Editors of the AMERICAN JOURNAL OF INTERNATIONAL LAW look forward with great interest to the publication of the *Egyptian Journal of International Law* and hope to have the pleasure of entering into an exchange arrangement with it. To Judge Brinton we extend our cordial congratulations upon the success of his efforts.

G. A. F.

INTERNATIONAL LAW CONFERENCE OF THE GROTIUS SOCIETY

The holding of a conference of prominent jurists from many lands in the midst of war to discuss objectively the various problems of international law is indeed an event. The conference of the Grotius Society held on April 29–30, 1944, at Burlington House, London, was attended by 134 jurists of many nationalities under the presidency of Sir Cecil Hurst, one of the judges of the Permanent Court of International Justice. Sir Arnold McNair, Vice Chancellor of Liverpool University, discussed the method whereby international law is made to prevail in municipal courts. He emphasized the difference between the Constitutional rule in the United States where treaties are applied *de plano* and that of Great Britain where Parliament must act where a treaty is not in accord with existing law. The discussion, led by Dean Keeton of University College, London, indicated a desire for a more uniform practice in this respect through international legislation.

"The Law of Nations and the Individual" was the subject discussed by V. R. Idelson, K.C., and Professor Lauterpacht of the University of Cambridge. While, by the law of nations, the individual is often intended to be the beneficiary he is seldom the legal subject of a right under that law. Twenty-five years ago no doubt was entertained but that states were the subjects of international law. The question is now admitted to be in progress of evolution, as witness such documents as the Atlantic Charter. The same problem has been given much attention in the United States under the title of an international bill of rights. Henri Rollin of Belgium, Dr. Hambro of Norway, Professor Vochoc of Czechoslovakia, and others participated in the discussion, which, though not embodied in any resolution, led to the conclusion that methods must be found to give individuals and certain international bodies, e.g. the UNRRA, access to international tribunals under proper limitations.

"The Organisation and Functions of the Future International Authority" was presented by Dr. C. J. Colombos, Honorary Secretary of the Society. He was in the main in agreement with the statements of Secretary of State Cordell Hull, of March 21, and April 8, 1944. Professor Goodhart of Oxford University advanced the following prerequisites to the successful functioning of an international authority: a just peace, the general strengthening of international bonds and the enforcement of peace by the peaceloving Powers. In such a plan he believed that there was no longer any room for neutrality. There was strong insistence by others that international administration should not be monopolized by the Great Powers and that the judicature be elevated to its proper place. "Put the judge first; a policeman has only to support the judge" (Mr. Harvey Moore).

Sir Cecil Hurst spoke on "The Nature of International Law and the Reason why it is binding on States." He insisted that it is not merely because the states agreed to be bound but because subjection to law is a necessary condition for being a state. From the moment of recognition the state must be regarded as bound by international law.

ROMAN K. KURATOWSKI,
Senior Lecturer of the Polish Faculty of Law at Oxford University

CONSULAR LAW SOCIETY

An organization of lawyers associated in various capacities with consular or diplomatic establishments in the United States was created at a meeting in New York City on March 16th under the name of THE CONSULAR LAW SOCIETY. The purposes of the Society, as stated in its Constitution, include promotion of the study and understanding of diplomatic and consular law and practice, the fostering of solidarity among members of the legal profession interested in those branches of the law, maintenance of proper professional standards among its members, and coöperation with

other learned societies in this field. On April 21st the Society voted to associate itself formally with the AMERICAN SOCIETY OF INTERNATIONAL LAW in accordance with the regulations of the latter.

Membership in the Society is open to lawyers in good standing admitted to practice before the Supreme Court of the United States or the highest courts of a State, territory, or possession of the United States and who, in addition, represent consular officers or diplomatic representatives or are interested in consular or diplomatic law. The following officers were elected for the first year: President, J. Irizarry y Puente; Vice Presidents, Louis Russell and Alfred J. Bedard; Secretary and Treasurer, Theodore Rickard, all of New York City. The Society has created an Advisory Council consisting of Edwin Borchard, Frederic R. Coudert, Manley O. Hudson, Henry W. Taft, and Quincy Wright. The founders of the organization anticipate greatly increased interest in treaties, statutes, and common law rules in this field in the post-war period.

P. B. P.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16, 1944–MAY 15, 1944

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain, Parliamentary papers; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin (replacing Treaty Information Bulletin *and* Press Releases); *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. T. S.*, Great Britain Treaty Series; *L. N. T. S.*, League of Nations Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

February, 1942

26–*March 7*, 1944 IRELAND—UNITED STATES. Texts of (1) United States note delivered Jan. 6, 1944 to Prime Minister de Valera (sale of merchant ships to Ireland); (2) United States request of Feb. 21, 1944 for the removal of Axis diplomatic and consular representatives from Ireland; (3) message of Feb. 26, 1942 from President Roosevelt to the Irish Prime Minister concerning American troops in the British Isles: *D. S. B.*, March 11, 1944, pp. 235–237. Texts of U. S. request of Feb. 21, 1944 and Irish reply of March 7, 1944: *N. Y. Times*, March 11, 1944, p. 4; London *Times*, March 11, 1944, p. 4. Texts of U. S. note regarding sale of ships and President Roosevelt's message of Feb. 26, 1942: *N. Y. Times*, March 12, 1944, p. 4.

January, 1944

1–*February 7* WHALING CONFERENCE. At the close of the conference, held in London, January 4, 13, 19 and 31, representatives of the United States, South Africa, Australia, United Kingdom and Great Britain and Northern Ireland, Canada, New Zealand and Norway, signed a Final Act, on January 31. *D. S. B.*, April 8, 1944, pp. 330–331. On Feb. 7 representatives of the same countries signed at London a protocol amending in certain particulars the International Agreement of June 8, 1937 and the Protocol of June 24, 1938, introducing certain amendments into the 1937 Agreement. *D. S. B.*, March 18, 1944, p. 271. Text of Protocol signed Feb. 7: *G. B. Misc. Ser.* No 1 (1944) *Cmd.* 6510.

12 ECUADOR—PANAMA. Signed agreement at Panamá, providing for the exchange of official publications and the recommendation for the study of history, physical geography and cultural life of the other contracting party. *D. S. B.*, April 29, 1944, p. 401.

26 AXIS POWERS—LIBERIA. British Foreign Office reported Liberia had declared war on the Axis Powers on this date. *N. Y. Times*, Jan. 28, 1944, p. 8.

27 COLOMBIA—UNITED STATES. Exchanged notes in Washington regarding application of the Selective Training and Service Act of 1940, as amended. Texts: *D. S. B.*, Feb. 12, 1944, pp. 184–186.

31 WAR CRIMES. Australian Minister for External Affairs announced appointment of a commission of inquiry to investigate Japanese crimes against Australians. London *Times*, Feb. 1, 1944, p. 3; *B. I. N.*, Feb. 5, 1944, p. 116.

February, 1944

5 NON-BELLIGERENCY. Argentina granted full non-belligerent rights to all American countries at war with the Axis. *B. I. N.*, Feb. 19, 1944, p. 152.

9 ITALIAN COMMITTEE OF LIBERATION. The Permanent Executive Junta of Liberated Italy addressed a note to the United States Congress, extending greetings and expressing determination to continue fight of the anti-Fascist parties. Text: *Cong. Record* (daily) March 30, 1944, p. 3333.

20 INTER-ALLIED COMMITTEE ON FOREIGN AFFAIRS. Announcement was made that the European Advisory Commission had set up the Committee to maintain liaison with representatives of Norway, France, The Netherlands, Czechoslovakia, Belgium, Yugoslavia, Greece and Luxembourg. *N. Y. Times*, Feb. 21, 1944, p. 6.

23 GREAT BRITAIN. Foreign Secretary Eden told the House of Commons that Great Britain reserves the right to intervene in the settlement of political affairs in any part of Europe, and denied agreement granting spheres of influence. *N. Y. Times*, Feb. 24, 1944, pp. 1, 6; London *Times*, April 24, 1944, p. 8.

25/*March* 3 CANADA—UNITED STATES. Exchanged notes at Ottawa regarding terms of reference for an investigation of the Upper Columbia River waters. Texts: *D. S. B.*, March 18, 1944, pp. 270–271.

28–*April* 22 FINLAND—SOVIET RUSSIA. Text of Soviet Information Bureau's statement of Feb. 28, broadcast by Moscow radio, recorded in London, and containing terms for Finland's withdrawal from the war: London *Times*, March 1, 1944, p. 4, *N. Y. Times*, March 1, 1944, p. 5. Finland delivered reply March 7. London *Times*, March 8, 1944, p. 4; *N. Y. Times*, March 8, 1944, p. 4. Finland rejected three Soviet demands. *N. Y. Times*, March 9, 1944, p. 1. Texts of Finnish rejection as broadcast March 21 and Soviet statement: *N. Y. Times*, March 21, 1944, p. 10. Soviet statement: London *Times*, March 22, 1944, p. 4. New Russian armistice terms were under consideration April 8. 6 points: *N. Y. Times*, April 9, 1944, p. 4: *B. I. N.*, April 15, 1944, p. 331. Finnish rejection of armistice proposals was approved April 12 by the Parliament. *N. Y. Times*, April 13, 1944, p. 2; London *Times*, April 13, 1944, p. 4. Moscow announced April 22 that Finland had rejected the Russian revised terms for an armistice. *N. Y. Times*, April 23, 1944, p. 1. Outline of terms: p. 7.

29 CHINA—JAPAN. Chinese Government announced it intended to demand compensation from Japan for all war damage to public and private interests since Japan's occupation of Mukden in 1931. *N. Y. Times*, March 1, 1944, p. 3.

29 FRENCH PROVISIONAL CONSULTATIVE ASSEMBLY. At its 3d session the Assembly asserted its authority on a parity with the French Committee of National Liberation, by requiring individual reports from the various Commissioners in place of a joint summary. *N. Y. Times*, March 1, 1944, p. 6.

March, 1944

1 JEWS IN PALESTINE. Syria and the Lebanon joined Egypt, Saudi Arabia and Iraq in making known Arab disfavor of making Palestine a home land for Jews *N. Y. Times*, March 2, 1944, p. 4.

2 AFGHANISTAN—CHINA. Signed treaty of friendship at Ankara. *N. Y. Times*, March 5, 1944, p. 13.

3 ITALIAN FLEET. President Roosevelt disclosed that the fleet will be distributed among Great Britain, Russia and the United States. *N. Y. Times*, March 4, 1944, p. 1. On March 10 the President indicated that a share of the fleet "or its equivalent" would be handed over to Russia. *N. Y. Times*, March 11, 1944, p. 5.

3–8 ARGENTINE RECOGNITION. Chile and Bolivia recognized the government of General Farrell on March 3 and 4. Text of United States statement: *N. Y. Times*, March

5, 1944; *D. S. B.*, March 4, 1944, pp. 225–226. Uruguay withheld recognition March 6. *N. Y. Times*, March 7, 1944, p. 1. Paraguay announced continuation of diplomatic relations on March 8. Great Britain, Nicaragua and Haiti withheld recognition. *N. Y. Times*, March 9, 1944, p. 4.

10 ARGENTINA. General Edelmiro Farrell became President, succeeding President Pedro Ramírez. *N. Y. Times*, March 11, 1944, p. 5.

10 GREAT BRITAIN—UNITED STATES. Effected agreement by exchange of notes at Washington regarding extension of time for copyright. Texts of notes and enclosures: *D. S. B.*, March 11, 1944, pp. 243–248.

13 GREAT BRITAIN—IRELAND. Great Britain suspended travel to Ireland, except for the most urgent reasons. *N. Y. Times*, March 13, 1944, p. 1; London *Times*, March 13, 1944, p. 4.

14 CANADIAN-AMERICAN JOINT ECONOMIC COMMITTEES. To be dissolved according to announcement of this date. *D. S. B.*, March 18, 1944, p. 264.

14/*April* 1 FRENCH COMMITTEE OF NATIONAL LIBERATION. Adopted law on March 14, published April 1, asserting the right of the Committee to control both military and civil regimes in French territory as it becomes liberated. Summary of law: *N. Y. Times*, April 2, 1944, p. 12.

14–*May* 8 GREAT BRITAIN—UNITED STATES. British Parliament extended invitation to the United States Congress to send representatives to Great Britain. *B. I. N.*, April 1, 1944, p. 280; London *Times*, March 15, 1944, p. 8. The Senate Foreign Relations Committee decided May 3 the invitation must be declined. *N. Y. Times*, May 4, 1944, p. 1. On May 8, Senator Connally introduced S. Con. Res. 43, to the effect that acceptance is inadvisable at present. *Cong. Record* (daily) May 8, 1944, p. 4175.

15/*April* 3 IRELAND—UNITED STATES. Prime Minister de Valera of Ireland and President Roosevelt exchanged messages on Germany's use of Rome for military purposes. *N. Y. Times*, April 20, 1944, pp. 1, 6. Texts: p. 6. Text of President Roosevelt's message: *D. S. B.*, April 22, 1944, pp. 371–372.

21–31 WEST INDIAN CONFERENCE. First conference opened March 21 at Bridgetown, Barbados, B.W.I. London *Times*, March 22, 1944, p. 3. Personnel, agenda, etc.: *D. S. B.*, March 18, 1944, pp. 262–264. Summary of proceedings: *N. Y. Times*, March 31, 1944, p. 9. The islands of St. John and St. Thomas of the Virgin Islands group were the first to accept and endorse the report of the Conference, according to announcement of April 18. *D. S. B.*, April 22, 1944, p. 384.

21/April 9 UNITED STATES FOREIGN POLICY. Text of Department of State statement embodying seventeen points: *N. Y. Times*, March 22, 1944, p. 12; *D. S. B.*, March 25, 1944, pp. 275–276. Text of Secretary Hull's address of April 9: *D. S. B.*, April 15, 1944, pp. 335–342; *N. Y. Times*, April 10, 1944, p. 6.

22–25 HUNGARY (Puppet Government). Following the resignation of the Cabinet on March 19, Admiral Horthy "in conformity with a reciprocal agreement" with the German Government told the Hungarian Ambassador to Berlin, Field Marshal Doeme Szotojay, to form a new Cabinet. Personnel: *N. Y. Times*, March 23, 1944, p. 7. On March 23–25 the Hungarian Ministers to Finland, Sweden, Portugal and Switzerland stated they did not recognize the new regime. *B. I. N.*, April 1, 1944, p. 282.

24 REFUGEES. President Roosevelt issued statement calling on all people to assist victims of German persecution and to record evidence of brutality. Text: *N. Y. Times*, March 25, 1944, p. 4; *D. S. B.*, March 25, 1944, pp. 277–278.

26 BELGIUM (in exile)—SWEDEN. Announced appointment of first Swedish Minister since the German occupation of Belgium. *N. Y. Times*, March 27, 1944, p. 6.

26 NETHERLANDS (in exile)—SWEDEN. Announced appointment of first Swedish Minister to the Netherlands Government since the German occupation. *N. Y. Times*, March 27, 1944, p. 6.

28 U.N.R.R.A.—UNITED STATES. President Roosevelt approved Joint Resolution for participation in the work of U.N.R.R.A. *D. S. B.*, April 1, 1944, p. 306; Public Law 267, 78th Congress.

30 CHINA—MEXICO. Announcement was made of appointment of the first Mexican Ambassador. Formerly Mexico was represented by a Minister to China and Japan jointly. *N. Y. Times*, March 31, 1944, p. 9.

30 JAPAN—SOVIET RUSSIA. Signed protocol at Moscow, whereby Russia regained the oil and coal concessions on Sakhalin Island, granted to Japan in 1925 for a 45-yr. term. Russia agreed to furnish Japan 50,000 tons of oil per year for five years, beginning after the war. The fisheries pact was also renewed for five years. *B. I. N.*, April 15, 1944, pp. 329–330; *N. Y. Times*, March 31, 1944, p. 1; April 2, p. 8. Texts of protocol, summary and Soviet statement: *N. Y. Times*, April 1, 1944, p. 4.

April, 1944

1 ALLIED ADVISORY COUNCIL FOR ITALY. Decided to hold all subsequent meetings at Naples. The Council also laid down administrative procedure and organized a secretariat. *N. Y. Times*, April 3, 1944, p. 5.

2 RUMANIA—SOVIET RUSSIA. Soviet Foreign Commissar Molotov broadcast a declaration that Russian army advances into Rumania did not indicate a desire to seize Rumanian territory, but were motivated by military necessity. Text: *N. Y. Times*, April 3, 1944, p. 3.

3/11 SWITZERLAND—UNITED STATES. The United States apologized for the recent bombing by mistake of Schaffhausen and promised every effort would be made in future to avoid a repetition. *D. S. B.*, April 8, 1944, pp. 314–315; London *Times*, April 4, 1944, p. 4. On April 11 the Swiss radio reported that Minister Harrison had paid $1,000,000 in reparation installment for compensation for April 1st bombing. *N. Y. Times*, April 12, 1944, p. 3. First official estimates indicated a material damage of $8,500,000. *N. Y. Times*, May 9, 1944, p. 2.

10 ITALY—SOVIET RUSSIA. Announcement was made that Mr. M. A. Kostylov had assumed post of Soviet representative to the Royal Government of Italy. He has diplomatic status, but is not described as ambassador or minister. London *Times*, April 11, 1944, p. 4.

10 UNITED NATIONS DECLARATION—LIBERIA. Liberia adhered to the Declaration, becoming the 35th nation. *N. Y. Times*, April 11, 1944, p. 12; *D. S. B.*, April 15, 1944, p. 346.

11 POISON GAS. Moscow radio charged the Germans and Rumanians had used gas during their occupation of Odessa. *N. Y. Times*, April 12, 1944, p. 5.

11–*May* 3 OIL CONFERENCE. Group of United States and British experts conducted preliminary exploratory discussions. *D. S. B.*, April 22, 1944, p. 372. Agreed to create an interim international oil commission to include Russia, China, Great Britain, United States and occupied European nations. *N. Y. Times*, May 4, 1944, p. 9. Text of United States announcement: *D. S. B.*, May 6, 1944, p. 411.

12-21 ITALY. King Victor Emmanuel announced his decision April 12 to turn over the powers of his office to his son, Umberto, on the day the Allies enter Rome. *N. Y. Times*, April 13, 1944, p. 1. Text of King's statement: p. 5. On April 17 the Cabinet resigned and Premier Badoglio began formation of a new Cabinet to include one representative from each of the six political parties. *N. Y. Times*, April 18, 1944, p. 1. The new Cabinet was announced April 21. *N. Y. Times*, April 22, 1944, p. 1.

13 NEW ZEALAND—SOVIET RUSSIA. Moscow radio announced decision to establish diplomatic relations and exchange Ministers. *N. Y. Times*, April 14, 1944, p. 4.

13/22 GREAT BRITAIN—SWEDEN—UNITED STATES. In a note dated April 13 Great Britain and the United States demanded that Sweden cease the exportation to Germany of ball bearings, and raw materials and machines used in making ball bearings. *N. Y. Times*, April 14, 1944, p. 1; London *Times*, April 14, 1944, p. 4. Sweden's refusal to halt shipments to Germany was handed to the United States Minister on April 22. *N. Y. Times*, April 23, 1944, p. 4.

14 BELGIUM (in exile). Premier Hubert Pierlot stated Belgium will remain a monarchy and the King will be returned to the throne after liberation of the country. *N. Y. Times*, April 15, 1944, p. 3.

14 CANADA—FRENCH COMMITTEE OF NATIONAL LIBERATION. Announced signature of a mutual-aid agreement. *N. Y. Times*, April 15, 1944, p. 2. Text: *D. S. B.*, May 13, 1944, pp. 456–457.

14/16 GREAT BRITAIN—TURKEY—UNITED STATES. The British and United States Ambassadors presented notes to Turkey on April 14, concerning Turkish exports to Germany and German-occupied Europe. London *Times*, April 15, 1944, p. 4; April 16, p. 3. The Turkish reply was delivered April 16. London *Times*, April 19, 1944, p. 3.

14/22 TURKEY—UNITED STATES. Exchanged notes at Washington, whereby the United States agreed to accept certain proposed reduction in Turkish import duties. *N. Y. Times*, April 30, 1944, p. 14. Texts: *D. S. B.*, April 29, 1944, pp. 397–398.

15 BRAZIL. President Vargas stated Brazilians would have the opportunity to choose their own democratic representative government after the war. *N. Y. Times*, April 16, 1944, p. 1; London *Times*, April 16, 1944, p. 3.

15 CANADA—CHINA. Signed treaty at Ottawa for the relinquishment of extraterritorial rights in China. Text, together with notes dated April 14: *D. S. B.*, May 13, 1944, pp. 458–461.

17/24 GREAT BRITAIN. Forbade neutral and Allied diplomats to leave the country and subjected all their communications to censorship with the exception of United States, Russian and Commonwealth missions. *N. Y. Times*, April 18, 1944, pp. 1, 5; London *Times*, April 18, 1944, p. 4; On April 24 travel was forbidden to overseas destinations except on urgent national business which could not be postponed. *N. Y. Times*, April 25, 1944, p. 1.

18 REFUGEES. The Executive Director of the United States War Refugee Board confirmed reports of a proposal to reserve certain areas near Eastern ports where refugees could be kept pending arrangements for their permanent disposition. *N. Y. Times*, April 19, 1944, pp. 1, 10.

20 EDUCATION CONFERENCE. Conference of Allied Ministers of Education, meeting in London, issued a memorandum announcing the text of a draft constitution for a proposed Organization for Educational and Cultural Reconstruction. Text of

memorandum: *D. S. B.*, May 6, 1944, pp. 414–415. United States delegation: *D. S. B.*, March 25, 1944, p. 293.

20 GERMANY—TURKEY. Turkish Foreign Minister announced decision to cease shipments of chrome to Germany, effective April 21. *N. Y. Times*, April 21, 1944, pp. 1, 6.

20–*May* 13 INTERNATIONAL LABOR ORGANIZATION. 26th conference opened April 20 at Philadelphia with 350 delegates from 41 countries. Walter Nash of New Zealand was elected conference president. *N. Y. Times*, April 21, 1944, p. 12. A letter from Marshal Badoglio of Italy was received April 27, asking readmission of Italy. Text: *N. Y. Times*, April 28, 1944, p. 11. Text of "Philadelphia Charter" as adopted on May 10: *N. Y. Times*, May 11, 1944, p. 14. Adopted May 11 recommendation of programs providing for socialized medicine, proposals in connection with demobilization and reconversion employment. *N. Y. Times*, May 12, 1944, p. 12. Text of resolution, adopted at closing session May 12, on social aims of the I.L.O. for peace settlement: *N. Y. Times*, May 13, 1944, p. 8. On May 13 the Governing Body of the I.L.O. named a committee of nine to present the social viewpoint of the I.L.O. at any international meetings prior to its next conference. *N. Y. Times*, May 14, 1944, p. 30. A tripartite committee of eighteen was created May 14. It will endeavor to work out a postwar program on full employment, in collaboration with the United Nations. *N. Y. Times*, May 15, 1944, p. 2.

21 CURRENCY STABILIZATION. Text of joint statement by British and United States monetary experts, meeting in Washington to discuss the establishment of a proposed international stabilization fund: *N. Y. Times*, April 22, 1944, p. 4; London *Times*, April 22, 1944, p. 4.

22 WORLD WAR. Status of countries in relation to the war as of this date: *D. S. B.*, April 22, 1944, pp. 373–382. Corrections: *D. S. B.*, May 6, 1944, p. 413.

23 HUNGARIAN NATIONAL COUNCIL. Was set up in London, under the leadership of Count Karolyi. The Council is not to be considered a government in exile. *N. Y. Times*, April 25, 1944, p. 15.

30 INTERNATIONAL RUBBER REGULATION COMMITTEE. Great Britain announced dissolution of the Committee upon expiration this day of the agreement between the United Kingdom, The Netherlands and India. *N. Y. Times*, May 1, 1944, p. 11.

May, 1944

1–16 PRIME MINISTERS CONFERENCE. Prime Ministers of the Dominions met in London. *N. Y. Times*, May 2, 1944, p. 1. On May 11 Mr. Mackenzie King of Canada cautioned against any change in the existing organization of the British Commonwealth. *N. Y. Times*, May 12, 1944, pp. 1, 3. The Conference closed May 16. *N. Y. Times*, May 17, 1944, p. 4. Issued a joint statement on May 17, calling for a postwar world organization. Text: *N. Y. Times*, May 18, 1944, p. 5.

2 SPAIN—UNITED STATES. The State Department issued statement announcing resumption of oil shipments to Spain from the Caribbean area, in return for Spain's promise to reduce the amount of wolfram to be sent to Germany by Spain. Spain also agreed to expel certain Nazi agents and to release certain Italian interned ships, etc. Text of statement: *D. S. B.*, May 6, 1944, p. 412. Text, together with Madrid communiqué: *N. Y. Times*, May 3, 1944, p. 8.

3 CANADA—UNITED STATES. Effected agreement by exchange of notes at Washington regarding diversion of water from Niagara Falls. *N. Y. Times*, May 10, 1944, p. 14; *D. S. B.*, May 13, 1944, p. 455.

4 BRAZIL—YUGOSLAVIA (in exile). National Bank of Brazil rejected demands of Yugoslav Government in Exile that a $9,500,000 deposit be surrendered. *N. Y. Times*, May 5, 1944, p. 6.

8 CZECHOSLOVAKIA (in exile)—SOVIET RUSSIA. Signed agreement in London providing for administration of Czechoslovak territory by Czechoslovak civil authorities, as soon as freed by Russian military forces. Text: *N. Y. Times*, May 9, 1944, p. 7. Great Britain and the United States had previously approved the pact. *N. Y. Times*, May 3, 1944, p. 9.

8–11 PRISONERS OF WAR. Tokyo radio stated that the Japanese Government had declared its readiness to send a vessel to Vladivostok to pick up supplies from the United States for the relief of American war prisoners and civilian internees in Japanese hands. Department of State announced no reply had been received to its protest of Feb. 5. *N. Y. Times*, May 9, 1944, p. 10. Secretary Hull announced on May 11 receipt of a note regarding the supplies at Vladivostok. *N. Y. Times*, May 12, 1944, p. 7.

9 COSTA RICA—SOVIET RUSSIA. Announced signature of an agreement at Mexico City for establishment of diplomatic relations, Mexico having acted as intermediary in the arrangements. *N. Y. Times*, May 10, 1944, p. 7.

9–18 INTER-AMERICAN DEVELOPMENT CONFERENCE. National Commissions met in New York. Agenda: *D. S. B.*, May 6, 1944, pp. 415–416. Secretary of State Hull's message to the Conference: *D. S. B.*, May 13, 1944, pp. 426–427. Several delegates proposed a pool of Pan-American capital after the war. *N. Y. Times*, May 9, 1944, p. 25.

10 CHINA—LEBANON. Announcement was made by Lebanese Prime Minister that Generalissimo Chiang Kai-shek had recognized Lebanon's independence. *N. Y. Times*, May 11, 1944, p. 11.

12 GREAT BRITAIN—SOVIET RUSSIA—UNITED STATES. Text of joint declaration regarding the four Axis satellites—Hungary, Rumania, Bulgaria and Finland: *N. Y. Times*, May 13, 1944, p. 5; *D. S. B.*, May 13, 1944, p. 425.

15 FRENCH COMMITTEE OF NATIONAL LIBERATION. French Provisional Consultative Assembly changed the name of the French Committee of National Liberation to the "Provisional Government of the French Republic." *N. Y. Times*, May 16, 1944, pp. 1, 4.

15 NORTH AFRICA. Speaking to the French Provisional Consultative Assembly, General de Gaulle said the Darlan-Clark agreements [protocol signed Nov. 1942] on which the Allies' military authority in North Africa rests, were not binding. *N. Y. Times*, May 16, 1944, p. 1. Basis of General de Gaulle's objections: p. 4.

INTERNATIONAL CONVENTIONS

INTER-AMERICAN AUTOMOTIVE TRAFFIC. Washington, Dec. 15, 1943.
Signature: Honduras. April 24, 1944. *D. S. B.*, May 6, 1944, p. 422.

INTER-AMERICAN CULTURAL RELATIONS. Buenos Aires, Dec. 23, 1936.
Promulgation: Bolivia. Nov. 29, 1943. *D. S. B.*, Feb. 26, 1944, p. 212.

INTER-AMERICAN INDIAN INSTITUTE. Mexico City, Nov. 29, 1940.
Adherence registered: Dominican Republic. Nov. 11, 1943. *D. S. B.*, April 8, 1944, p. 330.

INTER-AMERICAN INSTITUTE OF AGRICULTURAL SCIENCES. Washington, Jan. 15, 1944.
Signatures:
Dominican Republic and Honduras. Jan. 28, 1944. *D. S. B.*, Feb. 19, 1944, p. 195.

El Salvador. Feb. 18, 1944. *D. S. B.*, March 4, 1944, p. 230.
Guatemala. March 16, 1944. *D. S. B.*, March 25, 1944, p. 294.
Uruguay. April 17, 1944. *D. S. B.*, April 29, 1944, p. 400.
Ratification:
El Salvador. April 20, 1944. *D. S. B.*, May 13, 1944, p. 461.

TRADE MARK AND COMMERCIAL PROTECTION CONVENTION AND PROTOCOL. Washington, Feb. 20, 1929.
Ratification:
Paraguay. Aug. 30, 1943.
Ratification deposited:
Paraguay. March 1, 1944. *D. S. B.*, March 11, 1944, pp. 248-249.

U.N.R.R.A. Washington, Nov. 9, 1943.
Promulgation:
Honduras. Jan. 15, 1944. *D. S. B.*, April 1, 1944, p. 305.
Mexico. March 22, 1944. *D. S. B.*, April 22, 1944, p. 388.
Ratifications:
Dominican Republic. Jan. 24, 1944. *D. S. B.*, April 1, 1944, p. 305.
El Salvador. Dec. 23, 1943. *D. S. B.*, April 1, 1944, p. 305.
Ethiopia. Jan. 18, 1944. *D. S. B.*, April 1, 1944, p. 305.
Haiti. Feb. 29, 1944. *D. S. B.*, April 8, 1944, p. 329.
Mexico. Jan. 7, 1944. *D. S. B.*, April 1, 1944, p. 305.

WHALING. Protocol. London, Feb. 7, 1944.
Signatures:
United States, South Africa, Australia, United Kingdom, Canada, New Zealand and Norway. *D. S. B.*, March 18, 1944, p. 271.
Ratification deposited:
Norway. March 31, 1944. *D. S. B.*, April 29, 1944, p. 400.

DOROTHY R. DART

JUDICIAL DECISIONS

COLORADO *v.* KANSAS

SUPREME COURT OF THE UNITED STATES*

[December 6, 1943]

Supreme Court will not intervene in equity between States of the United States unless case is of serious magnitude and fully proven.

Mr. Justice ROBERTS delivered the opinion of the Court.

This suit is the latest of a series of litigations between Kansas, or her citizens, and Colorado, or her citizens, concerning their respective rights to the beneficial use of the waters of the Arkansas River.

The river has its origin in central Colorado, and is a mountain torrent for 130 miles to a point near Canon City where it enters a foothill region ending near Pueblo. Thence it traverses the high plains of eastern Colorado and western Kansas. In the areas mentioned the stream is non-navigable.

In 1901 Kansas brought suit against Colorado in this court for an injunction restraining the latter from diverting, or permitting anyone under her authority to divert, waters of the river within Colorado, and for general relief. *Kansas* v. *Colorado*, 206 U. S. 46.[1] Kansas in her bill alleged that the waters of the river had been used for irrigation in her western counties and that, after establishment of these uses, Colorado began systematically to appropriate and divert them between Canon City and the Kansas state line for irrigating non-riparian arid lands; that, by 1891, all the natural flow, and much of the flood waters, had been appropriated in Colorado so that the average flow had been greatly reduced and the natural flow completely cut off.

Colorado replied that the stream was not continuous except at times of flood; that, in a state of nature, its bed east of Pueblo was frequently dry; that Colorado and her citizens had diverted and used only the perennial flow above Canon City and what had been done in effect conserved water for delivery into Kansas She denied she had substantially diminished the flow of the river at the state line. She asserted she was entitled to consume the entire flow; but alleged that, in any view, her total appropriations did not amount to an infringement of Kansas' rights calling for judicial interference.

The court denied Kansas' contention that she was entitled to have the stream flow as it flowed in a state of nature. It denied Colorado's claim that she could dispose of all the waters within her borders, and owed no obligation to pass any of them on to Kansas. It declared that as each state had an equality of right each stood before the court on the same level as the

* No. 5, Original. October Term, 1943.

[1] The court overruled a demurrer to the bill and required Colorado to answer. Kansas *v.* Colorado, 185 U. S. 125.

other; that inquiry was not confined to the question whether any portion of the river waters were withheld by Colorado but must include the effect of what had been done upon the conditions in the respective states; and that the court must adjust the dispute on the basis of equality of rights to secure, so far as possible, to Colorado, the benefits of irrigation, without depriving Kansas of the benefits of a flowing stream. The measure of the reciprocal rights and obligations of the states was declared to be an equitable apportionment of the benefits of the river. The court added that, before the developments in Colorado consequent upon irrigation were to be destroyed or materially affected, Kansas must show not merely some technical right but one which carried corresponding benefits.

On examination of the proofs, the court concluded that diversions authorized by Colorado embraced more water than the total flow at Canon City. It found, however, that no clear showing was made as to what surplus water, if any, was contributed by the tributaries below that point or as to the proportion of the diverted water returned to the river by seepage. The opinion described the diversions in each state, analyzed the use made of the water and the benefits derived from it in each, considered population tables and agricultural statistics bearing upon the growth of the communities adjacent to the river in each, and stated conclusions, now material, as follows: That the result of Colorado's appropriations had been beneficial reclamation of many acres; that, while the influence of Colorado's diversions had been of perceptible injury to portions of the Arkansas valley in Kansas, yet to the great body of the valley the diminution of flow had worked little, if any, detriment; that regarding the interests of both states, and the right of each to receive benefit through irrigation and otherwise from the waters of the stream, the court was not satisfied that Kansas had made out a case entitling it to a decree. The court added that if depletion by Colorado continued to increase there would come a time when Kansas might justly say that there was no longer an equitable distribution of benefits and might rightly call for relief against Colorado and her citizens. Accordingly the bill was dismissed without prejudice to future action by Kansas. The taking of evidence ended June 16, 1905, and the decision of the court was announced May 13, 1907.

October 30, 1909, the Finney County Waters Users' Association, which maintained the so-called Farmers Ditch in Kansas, applied to a Kansas court for adjudication of priorities as between various Kansas users of the river water. One of the defendants, the United States Irrigating Company, removed the cause to the United States District Court. A consent decree was entered May 16, 1911, which provided for the allocation and rotation of use amongst certain, but not all, the Kansas ditches, including the Farmers' Ditch. It was, however, provided that the settlement should remain binding upon the parties only until the adjudication of other litigation next to be noticed.

August 27, 1910, United States Irrigating Company sued Graham Ditch Co. and others holding Colorado priorities, in the United States District Court for Colorado, to obtain an adjudication of priorities as between Kansas users and Colorado users. The Finney County Association was denied leave to intervene. Evidence was taken, but the suit was settled by a contract of February 19, 1916. By this settlement, the Colorado defendants agreed to recognize priorities as of August 27, 1910, for all the Kansas ditches in Finney County except the Farmers' Ditch; not to apply for, or claim, priorities for storage purposes on the Purgatoire River, a tributary of the Arkansas, or below the mouth of the Purgatoire, of a date earlier than August 27, 1910; and to pay the costs of suit and an additional sum to the Kansas interests. The Kansas ditches agreed to accept the priority date of August 27, 1910, and the quantities of water specified in the contract, as a definition and determination of their rights. The defendants complied with the terms of the contract.

The Finney County Association declined to become a party to the contract and, on November 27, 1916, brought suit in the United States District Court for Colorado against the same defendants for relief like that sought in the United States Irrigating Company's suit. January 29, 1923, the Finney County Association brought a second suit in the same court against other Colorado defendants for similar relief. January 24, 1928, Colorado filed the present bill against Kansas and the Finney County Association.

After formal recitals, the bill refers to our earlier decision, states that, in reliance upon it, money has been spent in the improvement of the irrigation systems in Colorado, recites the prior and the pending private litigation against Colorado appropriators, alleges that the establishment of an interstate priority schedule sought in the pending suits would disrupt and destroy Colorado's administration of the waters of the Arkansas basin and result in conflict of state authority, asserts that no proper settlement of the relative rights of the States can be obtained in suits by Kansas appropriators against Colorado appropriators, outlines other injury to Colorado threatened by prosecution of the pending cases to judgment, and prays that the Finney County Association be enjoined from further pressing those suits, that Kansas and her citizens be enjoined from litigating, or attempting to litigate, the relative rights of the two states and their citizens to the waters of the river on claims similar to those made by the Association in its pending suits, and that the rights of Colorado and her citizens as determined by the judgment in *Kansas* v. *Colorado* be protected.

Kansas' answer admits some allegations of the bill and denies others, sets forth her alleged rights in the waters of the river, recites appropriations by Kansas residents and citizens, diversions by Colorado citizens under appropriations junior in time and inferior in right to those made in Kansas, and asserts that, since the filing of the complaint in *Kansas* v. *Colorado*, Colorado users have largely increased their appropriations and diversions,

and threaten further to increase them, to the injury of Kansas users. She prays that the court protect and quiet her rights and those of her citizens and residents, including the Finney County Association, to their appropriations, that the rights of her citizens and residents to divert water from the river for irrigation be decreed in second feet and that Colorado, her officers, agents, and citizens be perpetually enjoined from diverting any waters from the river or its tributaries in Colorado until the rights of Kansas, her citizens and residents, are satisfied.

The Finney County Association filed an answer admitting and denying averments of the bill and affirmatively praying that Colorado and her citizens be enjoined from diverting water from the river until the Association's right to 250 second feet is satisfied. The issues were made up by Colorado's reply.

Pursuant to our order, evidence was taken by a Commissioner. Thereupon the cause was referred to a Master with leave to take additional evidence, and direction, in the light of all the evidence, to state findings of fact, conclusions of law, and to recommend a form of decree. The evidence consists of some seven thousand typewritten pages of testimony and 368 exhibits covering thousands of pages.

The Master states that the "evidence is voluminous and conflicting on many of the material issues of fact," but his report contains no discussion or analysis of the proofs. Apart from formal recitals, the report consists of fourteen findings of fact,—more properly conclusions of fact,—nine conclusions of law, and a recommended form of decree. Each party has filed exceptions.

Three questions emerge from the pleadings. (1) Is Colorado entitled to an injunction against the further prosecution of litigation by Kansas users against Colorado users? (2) Does the situation call for allocation of the waters of the basin as between Colorado and Kansas in second feet or acre feet? (3) Has Kansas proved that Colorado has substantially and injuriously aggravated conditions which existed at the time of her earlier suit?

The Master concluded that the first question should be answered in the affirmative. Kansas has not excepted to the conclusion or to the corresponding provisions of the proposed decree.

Bearing upon the second question, the Master found that "the average annual natural flow of the river and its tributaries" is 1,240,000 acre feet, and the "average annual dependable and fairly continuous water supply and flow" 1,110,000 acre feet. He recommends that the dependable flow be allocated 925,000 acre feet to Colorado and 185,000 acre feet to Kansas, 150,000 thereof between April 1 and October 1, and 35,000 between October 1 and April 1 of each year,—that is, five-sixths to Colorado and one-sixth to Kansas. He submits a form of decree embodying this allocation and adjusting required deliveries in the same proportions upward or downward in accordance with annual flows in excess of, or less than, the stated average annual dependable flow. He has not attempted to define flood waters or the

extent to which they are unusable by either state, and suggests no provision whereby their occurrence may be taken into account in defining Colorado's obligation to deliver water to Kansas. The form of decree requires measurement of flow by gauges, one at Canon City and the other at the mouth of the Purgatoire, and deliveries to Kansas prorated to the total of the flows at those points.

Both States except to these features of the decree as ambiguous and impossible of administration. Kansas, while asserting that the award to her is inadequate, professes her willingness to accept the recommended allocation, but insists that the decree require Colorado to deliver the quantity of water awarded to Kansas when and as demanded by her. Colorado asserts that the recommended decree,—much more Kansas' proposed amendment,—would entail serious and unjustified damage to her interests, if indeed compliance with its terms were possible.

In respect of the third question, the Master finds:

> "There has been since the taking of testimony in the case of Kansas against Colorado cited in 206 U. S. 46, in 1907, a material increase in the river depletion by Colorado of the water supply of the Arkansas River, which has been consumed and used by Colorado users for irrigation purposes and which has diminished the flow of the water into the State of Kansas and that by reason thereof there has been injuries to the substantial interests in Kansas."

No exception is taken to the Master's recommendation that an injunction issue against further prosecution of the Finney County Association suits against Colorado. In our view such an injunction is appropriate, and should be granted.

Colorado urges that our decision in *Kansas* v. *Colorado*, *supra*, amounted to an allocation of the flow of the Arkansas River between the two States We cannot accept this view. In that case Kansas labored under a burden of proof applicable in litigation between quasi-sovereign states, of which more hereafter. The dismissal of her bill resulted from the conclusion that she had failed to sustain the burden. But from the decision then rendered it follows that unless Kansas can show a present situation materially different from that disclosed in the earlier case she cannot now obtain relief.

The prayer of Kansas for an apportionment in second feet or acre feet cannot be granted. In our former decision we ruled that Kansas was not entitled to a specific share of the waters as they flowed in a state of nature, that it did not then appear that Colorado had appropriated more than her equitable share of the flow, and that if Kansas were later to be accorded relief, she must show additional takings working serious injuries to her substantial interests. This was in accord with other decisions in similar controversies.[2]

[2] See the cases in notes 3, 4 and 6 *infra*. In New Jersey *v.* New York, 283 U. S. 336, 347, the prayer of Pennsylvania for such an allocation was denied. Wyoming *v.* Colorado, 259 U. S. 419, is not an exception. As it happened, the doctrine of appropriation had always

The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes,[3] they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.[4]

It follows that the Master erred in attempting to divide what he designated as the "average annual dependable" water supply of the Arkansas River in Colorado into fractions and awarding those fractions to the states respectively. Such a controversy as is here presented is not to be determined as if it were one between two private riparian proprietors or appropriators.[5]

The lower state is not entitled to have the stream flow as it would in nature regardless of need of use.[6] If, then, the upper state is devoting the water to a beneficial use, the question to be decided, in the light of existing conditions in both states, is whether, and to what extent, her action injures the lower state and her citizens by depriving them of a like, or an equally valuable, beneficial use.[7]

We come now to the vital question whether Kansas has made good her claim to relief founded on the charge that Colorado has, since our prior decision, increased depletion of the water supply to the material damage of Kansas' substantial interests. The question must be answered in the light of rules of decision appropriate to the quality of the parties and the nature of the suit.

In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one

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prevailed in each of the states there concerned and furnished the most appropriate and accurate measure of their respective rights of appropriation of the flow of the Laramie River. It was, therefore, possible in enforcing equitable apportionment, to limit the amount of water which Colorado might, without injury to Wyoming's interests, divert to another water shed, to an amount not exceeding the unappropriated flow.

[3] Missouri *v.* Illinois, 180 U. S. 208; Kansas *v.* Colorado, 206 U. S. 46, 95, 96.

[4] See Washington *v.* Oregon, 214 U. S. 205, 218; Minnesota *v.* Wisconsin, 252 U. S. 273, 283; New York *v.* New Jersey, 256 U. S. 296, 313. Compare the Colorado River Compact of Nov. 24, 1922, authorized by Act of August 19, 1921, 42 Stat. 171, and dismissed in Arizona *v.* California, 292 U. S. 341, 345; and compare Hinderlider *v.* La Plata R. & C. C. Ditch Co., 304 U. S. 92. [5] Kansas *v.* Colorado, supra, 100.

[6] Colorado *v.* Kansas, *supra*, 85, 101–102; Connecticut *v.* Massachusetts, 282 U. S. 660, 669–670; Washington *v.* Oregon, 297 U. S. 517, 523, 526. [7] Cases cited in Note 8.

citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved.[8] And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.

On this record there can be no doubt that a decree such as the Master recommends, or an amendment or enlargement of that decree in the form Kansas asks, would inflict serious damage on existing agricultural interests in Colorado. How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It might indeed result in the abandonment of valuable improvements and actual migration from farms. Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs, and farms. The progress has been open. The facts were of common knowledge.

The controversy was litigated in 1901. Kansas was denied relief in 1907. The dispute between appropriators in the two states was brought into court in 1910 and settled in 1916. The Finney County Association sued Colorado appropriators in 1916 and 1923. Even if Kansas' claims of increased depletion and ensuing damage are taken at face value, it is nevertheless evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.

These facts might well preclude the award of the relief Kansas asks. But, in any event, they gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case.[9]

The Master concludes that there has been a material increase in depletion by Colorado, a consequent diminution of flow across the state line, and injury to the substantial interests of Kansas. His report does not state what he considers material; or the extent of the diminution of flow; or the interests of Kansas which have been injured and the extent of the injury. We must, therefore, turn to the evidence to resolve the issues.

Kansas asserts that since the decision of *Kansas* v. *Colorado, supra,* Colorado has increased her consumptive use of the water of the Arkansas River by an annual average of between 300,000 and 400,000 acre feet. Witnesses so testified and, to support their conclusions, submitted elaborate

[8] Missouri *v.* Illinois, 200 U. S. 496, 520–521; New York *v.* New Jersey, 256 U. S. 296, 309; North Dakota *v.* Minnesota, 263 U. S. 365, 374; Connecticut *v.* Massachusetts, 282 U. S. 660, 669; Alabama v. Arizona, 291 U. S. 286, 292; Washington v. Oregon, 297 U. S. 517, 522.

[9] Washington *v.* Oregon, 297 U. S. 517, 526.

calculations and analyses exhibiting the alleged total water supply of the river basin in Colorado and the alleged amount of water passing in the bed of the stream across the state line. A witness submitted tables covering the period 1895–1930 from which he deduced an average yearly water supply of 1,240,000 acre feet and an average annual dependable supply of 1,110,000 acre feet. He presented figures to show that Colorado's consumptive use had increased to the extent of an annual average of 300,000 acre feet. He reached this result by using estimated flow across the state line between 1895 and 1908 and measured flow between 1908 and 1930, during which period a gauging station was maintained at Holly near the line. Measurements indicate that, during the latter period, the average annual state line flow was 260,700 acre feet.[10] If, as claimed, this flow remained after an additional average annual depletion of 300,000 acre feet by Colorado, the average annual flow in the earlier period, 1895 to 1908, would necessarily have been greater by 300,000, or would have averaged 560,700 acre feet. The witness' own exhibit shows that he assumed an average annual state line flow for the period 1895–1899 of 300,000 acre feet, for 1900–1904, of 470,000 acre feet, and, for 1905–1909, of 454,000 acre feet, or an annual average over the total period, 1895–1909, of 408,000 acre feet. On his own estimates the claimed average annual depletion of 300,000 acre feet could not have taken place. Moreover, the force of this evidence is weakened by Kansas' allegations in *Kansas* v. *Colorado supra*. In her bill in that case she alleged Colorado had totally destroyed the normal flow of the river exclusive of floods whereas she now asserts that the flow at the time of the earlier suit was such that Colorado has been able to deplete it on an annual average of 300,000 acre feet.

The records of Colorado's consumption and ditch diversions, and the Colorado and Kansas exhibits showing the divertible and usable state line flow, rebut such an increase as Kansas asserts. Kansas' expert witness himself testified that the diversion records show no material change in Colorado diversions since 1905 and that if acreage in Colorado has expanded under the ditches on the main stem of the river it has done so because of an improved duty of water; that, during the period, the river gains due to return flow have increased, the consumptive use of water has declined, and relatively the stream flows have improved.

The Kansas ditches are capable of diverting water only up to 2,000 c.f.s. When the flow is greater the excess cannot be diverted and used. It is admitted that the character of the flow of the river in Colorado is variable from year to year, from season to season, and from day to day, and the main river below Canon City may be almost without water one day, run a flood the next day, and, on the following day, be in practically its original condi-

[10] In computing average annual flows, flood waters are included in the reckoning. As later shown, such annual averages do not represent the quantities of water usable by diversion ditches for irrigation.

tion. Thus it appears that both in Colorado and in Kansas there may at one time be flood water unavailable for direct diversion and, at another, not enough water to supply the capacity of diversion ditches. The critical matter is the amount of divertible flow at times when water is most needed for irrigation. Calculations of average annual flow, which include flood flows, are, therefore, not helpful in ascertaining the dependable supply of water usable for irrigation. That supply has, in Colorado, been supplemented by the extensive use of reservoirs for storage of flood waters and winter flows not usable or needed for irrigation. Though western Kansas affords sites for similar storage reservoirs, but one small basin has been constructed in that State. On the other hand, the storage in Colorado, and the release of stored water to supplement the natural flow of the stream in times of need, operates by seepage and return to the channel to stabilize and improve the flow at the state line and, to that extent, benefits irrigation in Kansas.

Kansas relies heavily upon the increase of irrigated acreage in Colorado since our decision in 1907. The testimony in the earlier case was closed in 1905. The then latest available census,—for 1902,—reported 300,115 acres under irrigation in the Arkansas basin in Colorado. In its opinion the court referred to this figure. The next census,—for 1909,—gives the Colorado acreage as 464,236. The later reports disclose an addition of less than 5,000 acres between 1909 and 1939. Thus a total of about 170,000 additional acres has been put under irrigation since 1902. On its face this record would seem to indicate a large increase of consumptive use by Colorado, but the acreage under irrigation does not afford a reliable measure of actual consumption. When first turned in, the water is rapidly absorbed by the sub-soil with consequent high consumption. By continued irrigation the sub-soil becomes saturated, the water table rises, and water, in increasing quantities, flows back to the stream. Ultimately consumption falls well below diversion. The returned water again may be diverted and again supply return flows. Since the decision in the earlier case, studies of return flows have been made which indicate a steady reduction in the quantity of water consumed per acre of irrigated land.

Practically all of the affected Kansas ditches are in three western counties. Tables taken from the United States census show that, in 1899, acreage irrigated in these counties was 6% of that irrigated in the Colorado basin. In 1909 it was 7%, in 1929, 9.7%, and, in 1939, 10.7%. It seems that Colorado cannot have depleted the usable supply passing into Kansas if acreage under irrigation is any measure of depletion.

Whatever may be said of the practices of Colorado since 1905, Kansas is not entitled to relief unless she shows they clearly have entailed serious damage to her substantial interests and those of her citizens. It is not necessary to quote the findings of this court made in the earlier case. We need only say they disclose that some ditches in western Kansas had been abandoned for lack of available water and all ditches were suffering from

shortages of flow. The court pointed out that Colorado had authorized diversions in excess of the flow at Canon City. And the record in the present case indicates that, except for seepage and return flow, the appropriations Colorado has authorized from the basin, as a whole, exceed the available dependable flow of the stream and its tributaries, and this appears to have been true also in 1901. It appears, nevertheless, that, since 1904, an increased quantity of usable water has passed the state line, for it is testified by Kansas' expert witness that, between 1895 and 1902, no divertible water passed the line and none between 1903 and 1907, except in 1903 and 1905, whereas, in each year since 1908 divertible water has crossed the state line in varying quantities and, in most years, in substantial amounts.

Kansas, however, insists that 414,000 acres in western Kansas are susceptible of successful irrigation, and much of this land would have been irrigated had Colorado not deprived Kansas of her equitable share of the flow. The evidence is that the acreage now irrigated in Kansas lies close to the river and along the river bottom. The land claimed to be susceptible of irrigation extends many miles from the bed of the river. We are asked to speculate as to how much of this land would have been put under irrigation under more favorable circumstances.

As has been pointed out, despite Colorado's alleged increased depletion, the acreage under irrigation in western Kansas through existing ditches has steadily increased, over the period 1895–1939, from approximately 15,000 acres to approximately 56,000 acres. Moreover, the arid lands in western Kansas are underlaid at shallow depths with great quantities of ground water available for irrigation by pumping at low initial and maintenance cost. There is persuasive testimony that farmers who could be served from existing ditches have elected not to take water therefrom but to install pumping systems because of lower cost.

Again, there is serious question whether lands which are not riparian may divert the water from the stream for irrigation. In the earlier suit Kansas asserted,[11] and the court held,[12] that the common law prevailed in Kansas and governed the rights of riparian owners. It is true that the rule as to riparian rights has been expanded by the common law of Kansas to permit a riparian proprietor reasonable use of the waters of a stream for irrigation.[13] But such use is subject to the rights of other riparian owners to a like reasonable use. What is reasonable must, in each instance, be determined in the light of total supply and total need of all riparian owners.[14] It is also true that, beginning in 1886, Kansas, by statute, recognized appropriation for irrigation. But there is doubt whether the privilege is not restricted to riparian owners in some portions of the state. The Supreme Court of Kansas has held that, where a title originates in a grant antedating the Act of 1886, the right of appropriation is limited by the common law as to riparian rights,

[11] 206 U. S. 51, 52, 58, 59, 60, 61.
[12] *Ibid.*, 95, 99, 102, 104.
[13] Campbell *v.* Grimes, 64 Pac. 62.
[14] Clark *v.* Allaman, 71 Kan. 206.

which are rights of property derived from the original patent or deed in the line of title.[15] It seems that title to much of the land along the Arkansas Valley in western Kansas was originally granted or patented prior to 1886. The brief and argument of Kansas, while referring to the statutes of the state authorizing appropriation, make no reference to the Kansas decisions and no showing with respect to the right of non-riparian owners to appropriate waters against objection by other such owners.

The official census figures submitted bearing upon population of the western counties of Kansas, and the agricultural production in them, give no support to a claim that the inhabitants have suffered for lack of arable and productive land. Generally speaking, the population has steadily increased and the agricultural production has also risen throughout the period in question.

All these considerations persuade us that Kansas has not sustained her allegations that Colorado's use has materially increased, and that the increase has worked a serious detriment to the substantial interests of Kansas.

A decree should be entered enjoining the further prosecution of the Finney County Association's suits, and dismissing the prayers of both States for other relief. The parties may submit such a decree.

in re ZALEWSKI

COURT OF APPEALS
STATE OF NEW YORK *

[April 13, 1944]

Under the treaty of 1931 between the United States and Poland the Consul-General of Poland may, without direct authorization by or communication from a decedent's widow who resides in and is a national of Poland, exercise on her behalf the right of election given to her by section 18 of the Decedent Estate Law to take against the decedent's will. The powers of the Consul-General are not those of a mere spokesman or conservator. He is a personal agent of his national, "charged with doing what the individual himself might do to defend his interests under the local law if he were present and competent."

Present: LEHMAN, Ch.J.; LOUGHRAN, RIPPEY, LEWIS, CONWAY, DESMOND and THACHER, JJ.

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 23, 1942, which unanimously affirmed a decree of the Kings County Surrogate's Court (Wingate, S.; opinion 177 Misc., 384), settling the account of the executor of Joseph Zalewski, deceased. The appeal

[15] Frizell *v.* Bindley, 144 Kan. 84. Cf. Smith *v.* Miller, 147 Kan. 40; 75 P. 2d 273.
* 292 N. Y. 322.

was taken from such portions of the order of the Appellate Division as affirmed provisions of the decree pertaining directly or indirectly to the question of the validity of a right of election filed on behalf of appellant Felicja Zalewski, as surviving spouse of the decedent. The decree provided that objections filed by the Consul-General of the Republic of Poland to the rejection by the executor of appellant's claim to a right of election to take an intestate share of the estate as surviving spouse of the decedent pursuant to a notice of election filed on her behalf by said Consul-General, should be dismissed.

Joseph B. Blum and Joseph H. Stein for appellant.
Thomas J. Snee for respondent.

DESMOND, J.—We gave permission for this appeal so that we might pass on this question: Can the Consul-General of the Republic of Poland, under the existing treaty between his government and the Government of the United States, and without direct authorization by, or communication from, his national who resides in Poland, validly exercise on her behalf the right accorded her by section 18 of the Decedent Estate Law, to "take against the Will" of her late husband? The will's only provision for the absent wife is a legacy of $100. Since the net estate amounts to about $8,500, it is obviously to her advantage that there be protection of her statutory right to take, in contravention of the will, one third of her husband's net estate. The grant of authority on which the Consul-General relies, in his effort to furnish such protection, is Article XXIV of the 1931 "Treaty of Friendship, Commerce and Consular Rights" between Poland and the United States, reading as follows: "Article XXIV: A consular officer of either High Contracting Party shall, within his district, have the right to appear personally or by delegate in all matters concerning the administration and distribution of the estate of a deceased person under the jurisdiction of the local authorities for all such heirs or legatees in said estate, either minors or adults, as may be non-residents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney to represent them unless such heirs or legatees themselves have appeared either in person or by duly authorized representative."

The surrogate agreed with the Consul-General's assertion that the latter is, under this treaty and under general international law, an attorney in fact for his national. He ruled, however, that the widow was not, in these circumstances, one of the "heirs or legatees" to whom the treaty refers and ruled further that any exercise of the "personal right of election" granted to the widow by section 18, requires "personal action by the benefited individual."

In arriving at the meaning of the treaty we are bound to remember that it is the supreme law of the land (U. S. Const. Article VI; *Geofroy* v. *Riggs*, 1933 U. S., 258), that its words are to be taken liberally in the light of evident

purposes (*Hauenstein* v. *Lynham*, 100 U. S., 483) and that, since the pact is done in counterparts, one in each language, little use can be made of local technical definitions of words (*United States* v. *Percheman*, 7 Pet., 51). When two constructions of a treaty are admissible, one restrictive of the rights that may be claimed under it and the other liberal, the latter is always to be preferred (*Hauenstein* v. *Lynham*, *supra*). "This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law" (*The Bello Corrunes*, 6 Wheat, 152, 171). Those settled rules of construction forbid the employment of so restricted a meaning as was given below to the words "heirs or legatees." While these are words of art when found in certain settings, they take on in an international treaty the broader intendments which the purposes of the "High Contracting Parties" require. It is not permissible, therefore, to exclude Mrs. Zalewski, as did the surrogate, from the rank of "heir" on the ground that the case is not one of intestate distribution or to refuse her the protection due a "legatee" because her asserted right to take one third is not based on anything in the will. In truth, she is, even under local meanings of the terms, both an "heir" (by statutory definition, Decedent Estate Law, sec. 47-c) and a "legatee" (since the will contains a small bequest to her). This treaty will be receiving something less than "liberal" treatment if she is held not to be one of the persons for whom the Consul-General may intervene in our Surrogates' Courts.

The narrow meaning given below to the words of the statutes, "personal right of election," must be discarded, also. The distinguished commission which drafted section 18 of the Decedent Estate Law gave us a valuable clue to the meaning of "personal right of election" when it informed the Legislature (see 1928 report, note to section 18) that "such right of election if not previously exercised will be lost upon the death of the surviving spouse and will not pass to his or her executor or administrator." "This is similar," wrote the commission, "to the personal right of the widow to elect against a testamentary provision in lieu of dower, which right ends upon her death" (citing *Flynn* v. *McDermott*, 183 N. Y., 62; *Camardella* v. *Schwartz*, 126 App. Div., 334; *Youngs* v. *Goodman*, 240 N. Y., 470). We find no basis for a holding that "personal" means anything more in this statute than it did in the dower cases which the commission cited. Under those cases, the "personal" character of the election had the result that the privilege of a widow to elect to take her dower rights did not pass to her legal representatives (*Flynn* v. *McDermott*, *supra*, at p. 65; *Youngs* v. *Goodman*, *supra*, at p. 473). That this was what the Legislature had in mind when it inserted the word "personal" in section 18 has been held in many Surrogate Court decisions since *Matter of Mihlman* (140 Misc., 535). The commission's own indication as to the significance of the word "personal" in section 18 makes it unnecessary, we think, to rely on the legislative admonition that these

statutes "shall be liberally construed" to carry out the intention "to increase the share of a surviving spouse in the estate of a deceased spouse" (L. 1929, chap. 229, sec. 20; see *Matter of Byrnes*, 260 N. Y., 465, 472).

Of course, the right to elect is "personal" in the sense that an election must in each case be a conscious, individually made choice between the statutory provision and the testamentary provision (see *Matter of Hills*, 264 N. Y., 349, 355). The statute (sec. 18, subdiv. 7) says that the choice between those alternatives shall be made "by serving written notice of such election upon the representative of the estate," but nothing suggests that the Legislature intended thereby to require a writing subscribed by the widow's own hand. It has been assumed that the act prescribed may be performed by the spouse herself "or by her duly authorized agent or attorney in fact" (*Matter of Banks*, 31 N. Y. S., 2d, 652, 655). In the Supreme Court of Pennsylvania there is direct authority that such a notice of election may be signed, on behalf of the widow, by one holding a power of attorney in general terms which did not specifically confer authority to make such an election (*Celenza's Estate*, 308 Penn. St., 186). The Appellate Division, in its opinion for affirmance in the present case, expressed the view that neither the common law nor the treaty entitled the consul "to exercise a right which was personal to the widow" (265 App. Div., 878). It made the further observation that "the office of the Consul is no more extensive in that respect than that of a committee of an incompetent" (citing *Matter of Hills*, 264 N. Y., 349, 353; *Matter of Brown*, 212 App. Div., 677, 679, aff'd 240 N. Y., 646). That view fails, we think, to take into account the controlling fact that the Polish-American treaty in terms gives the Consul-General the same powers as if he held a power of attorney from the "heirs or legatees." The Brown case (*supra*) asserted the power of a court of equity to make an election, as to dower, on behalf of an incompetent widow. Section 18 gives statutory sanction to such an exercise of equitable powers for the safeguarding of an insane widow's rights under section 18. But we are here examining into the authority of one who by treaty has been constituted the attorney in fact of his absent national. Powers of attorney to represent interested parties have traditionally been recognized in the Surrogate's Court (see Surrogate's Court Act, sec. 231-b). No limitation of this consul's agency is expressed in the treaty save only that he is not to act if the heirs or representatives themselves have appeared in person or by duly authorized representatives. The consul's treaty-created power of attorney is, like any similar grant, "to be construed according to the natural meaning of the words in view of the purpose of the agency and the needs of its fulfillment" (*Porges* v. *U. S. Mort. & Trust Co.*, 203 N. Y., 181, 188). It is to be interpreted in the light of the situation, the parties, the subject matter involved, and general usages (Restatement of the Law of Agency, secs. 32, 34, 37). The coverage of the agency must not be so strictly delimited as to defeat its very purpose (*Matter of McArthur*, 173 App. Div., 517, 519).

We think the narrowing walls erected by the courts below go far toward barring the consul from all right to do anything effective or practical in the interest of his absent fellow-countryman. His commission from his government (and from ours) to "appear" for Mrs. Zalewski and to "represent" her must, in common sense, assign to him duties more helpful and useful to her than that of merely standing mute at the bar of the Surrogate's Court.

Whatever the word "appear" may mean in the case of attorneys at law, it does not operate to narrow the role of the consul to that of a mere spokesman, powerless without specific instructions, especially when the word "appear" is linked in the treaty with the explanatory phrase "as if he held their power of attorney to represent them." If the consul had definite instructions from his national, he would not need the treaty as his credential. If the absent national had communicated her wishes to any "duly authorized representative," Article XXIV would be out of the picture. The result of the decisions below in this proceeding is to close the doors of the court on the consul, unless he can show formal authorization from his national, whereas the treaty shows on its fact that the consul is to take part in the proceedings only when there is absence of any such formal authorization running to him or to anybody else (see *Matter of Kolodziej*, 153 Misc., 115).

Finally, we are confirmed in our view that this treaty makes the consul more than a mere conservator or protector of property by other articles of this 1931 Polish-American Treaty. Articles XX and XXII empower him to take appropriate steps toward such conservation and protection, but Articles XXII and XXIII go much farther (as does Article XXIV, which we are here construing) by according him the right to "act personally" in matters concerning claims for non-support of nonresident minor children against a father who is a resident alien, and the right to assert claims for workmen's compensation on behalf of his absent countrymen. On all the authorities and precedents, we conclude that this Consul-General is, for present purposes, a personal agent of his national, charged with "doing what the individual himself might do to defend his interests under the local law if he were present and competent" (Harvard Research, *supra*).

The order of the Appellate Division and the decree of the Surrogate's Court, so far as appealed from, should be reversed, with costs in all courts to both parties payable out of the estate, and the matter remitted to the Surrogate's Court for further proceedings not inconsistent with this opinion.

LEHMAN, Ch.J. (dissenting)—Josef Zalewski died on September 17, 1940. In his will he bequeathed the sum of one hundred dollars to his wife Felicja Zalewski. Felicja Zalewski is a resident and national of the Republic of Poland. The will was admitted to probate and letters testamentary were issued to the executor named in the will. The Consul-General of the Republic of Poland executed, served upon the executor and filed an instru-

ment stating: "I, Hon. Dr. Sylwester Gruszka, Consul-General of the Republic of Poland . . . acting on behalf of the surviving spouse of Joseph Zalewski, deceased, to wit, Felicja Zalewski, a resident of the Republic of Poland . . . do thereby exercise the personal right of election given the said Felicja Zalewski, pursuant to the provisions of section 18 and the Decedent Estate Law, and do hereby elect, on behalf of the said Felicja Zalewski, to take her share of the estate of the said decedent as in intestacy." Thereafter the executor brought proceedings to settle his account and the Consul-General appeared and filed objections on behalf of the testator's spouse. His power to "exercise the personal right of election given the said Felicja Zalewski" was challenged and the courts below have sustained the challenge.

I concur in the opinion of Judge Desmond in so far as it holds that the "personal right of election" given to the surviving spouse of a testator by section 18 of the Decedent Estate Law is "personal" only "in the sense that an election must in each case be a conscious individually made choice between the statutory provision and the testamentary provision." I assume, too, that authority to sign the notice of election may be delegated to an attorney in fact by the surviving spouse and that a power of attorney in general terms may sufficiently evidence an intention by a widow to "delegate the signing of the paper declaring her intention not to take under her husband's will," at least where it appears that the general power has been executed by the widow for the purpose of enabling the attorney in fact to assert the widow's personal right of election (*Matter of Celanza's Estate*, 308 Penn. St., 186). Nonetheless, there is no "conscious individually made choice" by a surviving spouse unless that choice is made by the spouse or by a person authorized to act in her behalf. The appellant asserts that the power to make that choice in behalf of a resident and national of the Republic of Poland has been conferred upon him as Consul-General by treaty between the United States and the Republic of Poland. The problem presented upon this appeal is whether it was the intention of the two sovereign states to confer upon the consular officers such power to act in behalf of their nonresident nationals.

The appellant relies upon Article XXIV of that treaty as quoted in the opinion of Judge Desmond. The only right or power expressly conferred by that section upon a consular officer is "the right to *appear* personally or by delegate in all matters concerning the administration and distribution of the state of a deceased person . . . for all such heirs or legatees in said estate . . . as may be nonresidents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney to represent them. . . . " I agree that the words of a treaty are not to be given a restricted technical construction which would impede the fulfillment of the purpose of the treaty.

The purpose of the section of the treaty upon which the appellant relies

is clear. To protect the property interests of his nonresident nationals in an estate of a deceased person, a consular officer may "appear" and "represent" them in every form of judicial or administrative proceedings. No construction of the words "heirs or legatees in said estate" is reasonable if it excludes a person who under our law has a right to share in the estate under a will or as in intestacy. I cannot, however, find in the treaty any indication of a purpose to confer upon a consular officer power to exercise in behalf of a nonresident national a "personal election," i.e., a conscious, individually made choice between the statutory provision and the testamentary provision—nor do I think that by any process of liberal construction can the power to "appear" and "represent" heirs and legatees in the estate be stretched to include power to exercise such a choice for one of them.

The effect we give herein to Article XXIV is not only a "sensible and reasonable" one (*Hamilton* v. *Erie RR. Co.*, 219 N. Y., 343, 353), but is in harmony, also, with the long trend of authority in this country. Discussions as to the nature and extent of consular authority to represent nationals in our courts usually begin with the case of *The Bello Corrunes (supra)* decided in 1821. That decision was cited by the surrogate in his opinion here, as stating "a familiar principle of law that foreign consular representatives are deemed international attorneys in fact for their nationals" (177 Misc., 384, 386). In *The Bello Corrunes* the Spanish Vice-Consul could point to no treaty provision setting forth his rights; nonetheless he was held entitled, by virtue of his office, to the privilege of suing in one of our courts of admiralty for return of a ship owned by Spaniards whose very names he did not know. "A Vice-Consul duly recognised by our Government," wrote Justice Johnson "is a competent party to assert or defend the rights of property of the individuals of his nation, in any Court having jurisdiction of causes affected by the application of international law" (p. 168). A few years earlier Justice Story, on circuit, wrote an opinion in *Rowe* v. *Brig* (Fed. Cas. No. 12093) upholding the right of a Spanish Consul to defend in court, on behalf of absent and unknown Spanish owners, against a claim made by salvors. In 1851 another federal judge wrote (*Robson* v. *Huntress*, Fed. Cas. No. 11971) that "the right of a consul to intervene on behalf of citizens of his own country who are absent but interested, seems too well established in practice to be doubted." In Alabama (*Carpigniani* v. *Hall*, 172 Ala., 287) the court found authority in "the law and comity of nations" for allowing the Italian Consul, without treaty provision or authorization by his interested nationals, to petition for the removal of an administrator who had obtained his appointment through fraud. The New York decisions have followed this trend. In *Matter of Tartaglio* (12 Misc., 245, 246) a much-cited case, the court, while passing on the right of an Italian Consul to demand and receive for his nationals their distributive shares of an estate, wrote that the word "defend" in the applicable treaty "is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's coun-

trymen, and our local as well as federal judiciary must, in obedience to the treaty, recognize such rights." The surrogate in that opinion expressed the view that "in the absence of such treaty provisions a foreign consul would have much the same power."

The power of the consul to bring suits and take positions in court is not to be considered as limited to the mere conservation of property or the collection of liquidated claims. Numerous decisions uphold his right to stand on a broader platform. The leading case of *Herman's Estate* (159 Minn., 274) affirmed the consul's right to file objections to a will. In *Szabo's Estate* (143 N. Y. S., 678) Surrogate Fowler, citing *Carpigniani* v. *Hall* (*supra*) wrote that he had no doubt as to the Austrian Consul's right to petition for the revocation of letters testamentary issued to another. This court, in *Hamilton* v. *Erie RR. Co.* (*supra*) while denying a consul's right to compromise a claim of his nationals in an action for negligently causing death, did not circumscribe the consul's activities on behalf of his nationals in a Surrogate's Court proceeding. In *Hunko* v. *Buffalo Crushed Stone Co.* (203 App. Div., 284) a vice-consul was recognized as a proper person to file a claim for workmen's compensation where the widow of the deceased workman resided in and was a citizen of a foreign land (for a similar holding, as to a suit under an Employer's Liability statute, see *Ljubich* v. *Western Cooperage Co.*, 93 Ore 633). Consuls have been found qualified to represent alien infants in accounting proceedings (*Matter of Bristow*, 63 Misc., 637; *Matter of Ostrouski*, 160 Misc., 482). No case has been found wherein there has been directly passed upon the right of a consul to make a formal election for his non-appearing national, but we see no reason why his broad powers should stop short of that. The bringing of or defense of a lawsuit, the enforcement of any claim or the filing of any sort of objection in Surrogate's Court, always involves the making of an election of one kind or another. Our courts will as they did in *Hamilton* v. *Erie RR. Co.* (*supra*) protect the absent party against any assumption by a consul of power to give away, release or sacrifice the absent party's rightful claims, but no such adverse action by the Consul-General is involved here. The situation here disclosed clearly calls for more than a mere collecting in for the widow of her legacy and the property set off to her under section 200 of the Surrogate's Court Act (to which exempt property the surrogate held the consul could make claim). The consul-general, we think, might well take his stand on the rule as stated by a company of recognized scholars in the Harvard Law School's "Research in International Law" (p. 278): "Inquiry, preliminary intervention and conservatory measures may not prove sufficient to protect the interest of an absent, minor or incompetent national of the sending state. In that case the consul is entitled by this paragraph to represent such national in proceedings before the courts or other authorities of the receiving state, initiating and defending actions and in general doing what the individual himself might do to defend his interests under the local law if he were present and

competent. The consul must of course conform to the local law. While in representing his absent national he would be an attorney in fact, he could not appear as attorney in law unless a member of the bar of the court before which he acts (see Mexico, Law 1859, Art. 10, par. 2)."

The Legislature of this state, in a statute passed in 1936 and which applies only to estates smaller than this one, conferred upon consuls much more complete power and duties of representation than are here asserted by the Consul-General. By that enactment (Surrogate's Court Act, section 56-a) it is provided that when the gross estate is less than $2,000, or a non-resident alien's interest is worth less than $300, service of process on the alien may, by surrogate's order, be made on the nearest consul of the nation of which the alien is a national, and any and all other service on the alien, even by mailing, may be dispensed with. Service on the consul, says section 56-a, "shall be deemed personal service upon such alien within the state." When so served, the statute says, the consul "may appear and act on behalf of his national in the proceeding unless and until the national shall himself appear either in person or by the other duly authorized representative." While section 56-a cannot be applied in this estate, because of the amounts involved, it is at least an expression of public policy not at variance with the result we reach in this opinion.

In no cited case has a court sustained an assertion of power in consular officers to do more than act for the protection of rights granted to their nationals by law. The courts have drawn back whenever they were asked to sanction an exercise of any broader power by a consular officer. Thus, in *The Bello Corrunes* (6 Wheat, 152, 168), the court said: "A Vice-Consul duly recognized by our Government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any Court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States, has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the Vice-Consul shall in any instance extend to the right to receive in his national character, the proceeds of property libelled and transferred into the registry of a Court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized."

Again, in *Matter of Herman's Estate* (159 Minn., 271) cited by Judge Desmond as a leading case, the court said "a consul may doubtless take appropriate measures for the protection of the property interests of the citizens of

the country which he represents in cases where they have no other representative and are not present to act for themselves. But he acts merely in his official capacity as the representative of his government and not as the personal agent or representative of the parties in interest, unless he has been given special authority to act for and represent them (citing cases). His acts are provisional, and for the purpose of preserving the property and securing for his nationals an opportunity to assert and maintain their rights thereunder. . . . We have been cited to no case and we have found none, holding that a consul, simply by virtue of his office, has power to act for and represent individual claimants to property so as to foreclose their claims without special authority to do so."

The exercise of the personal right of election "requires the abandonment or destruction of an alternative right" (*Matter of Hills*, 264 N. Y., 349, 353). The statute which creates the right of election does not make its exercise subject to the approval of the court. It confers absolute freedom of choice on the surviving spouse of a testator. Many personal considerations usually influence that choice, and no person other than the surviving spouse can weigh these considerations. If a consular officer can exercise the "personal" right of election conferred upon a surviving spouse as if he had a power of attorney for that purpose he may destroy the alternative right which the spouse whom he represents might prefer and there is nothing in the statute or in the treaty which would empower a court to refuse to give effect to the choice so made though it might be patently unwise. In this case the bequest which is abandoned is small, and perhaps the choice made by the consular officer may be wise and would be approved by the court. The Legislature has not, however, made the right to reject a testamentary provision dependent upon its inadequacy, and if under the treaty that right may be exercised in behalf of a non-resident national by a consular officer, no restriction upon such exercise is expressed in the treaty or can be read into the treaty by fair implication.

The words "a consular officer . . . shall . . . have the right to *appear* . . . for all such heirs or legatees . . . as may be nonresidents and nationals of the country represented by the said consular officer *with the same effect as if he held their power of attorney*" are not fairly open to the construction that the consular officer may act for them in all matters as if he held their general power of attorney. He has the right to "appear" for them as if he held their power of attorney, and under the treaty he can exercise no other right. He may be authorized to act as their personal agent so far but no further. He may "assert or defend the rights of property of the individuals of his nation, in any court." He is not authorized to exercise for a national a personal choice to take an intestate share of the testator's estate in lieu of any provision made for the benefit of the national in the will.

LOUGHRAN, CONWAY and THACHER, JJ., concur with DESMOND, J.; RIPPEY and LEWIS, JJ., concur with LEHMAN, Ch.J.

REX *v.* GUENTHER KREBS

IN THE MAGISTRATE'S COURT OF THE COUNTY OF RENFREW, ONTARIO*

[October 7, 1943]

Prisoner of war not punishable at common law for attempting to escape or for doing anything reasonably calculated to assist in that escape or preserve his liberty.

Magistrate THOMAS GALLIGAN rendered judgement as follows.

Two weeks ago this accused was brought before me on a charge of breaking and entering and theft and elected for trial before me. On hearing the evidence I reserved judgment until today.

There seems to be very little authority in the way of case law for the determination of matters of this kind, and although I looked at all the authorities available here, I could find nothing exactly in point.

The accused is a German, a prisoner of war, who was a wireless operator on a German merchant ship. He was taken prisoner in 1939. He was confined at various places throughout the Empire, the last of these being the camp for prisoners of war at Petawawa Military Camp in this County. In July of this year he escaped from his confinement and was later re-taken at Hornepayne, Ontario. Some time between the morning of July 16th and July 18th of this year he broke into a small house or cabin owned by one Herman Gould in the Township of Fraser, ate all the food he could find in the house and left, taking with him a rifle, a quantity of ammunition therefor, a pouch, a watch, a flash light, batteries, a safety razor, a can opener, a jack knife, some matches and several articles of clothing.

All of the articles taken are admittedly articles which would be useful to a man who expected to be in the bush for some time. All, in my opinion, can reasonably be considered necessaries under the circumstances, with the possible exception of the rifle and ammunition, and it is not difficult to think of circumstances wherein a lone man, in what is very near to being a wilderness, would find the rifle and ammunition also necessaries. This is particularly so when that man is an enemy of the country in which he finds himself, and is desirous of escaping from that country. He could not, under the circumstances, approach any of the very few settlers in that part of the country for assistance, because his full desire was to escape.

Although it has been represented to me that the onus is on the accused to show that the articles taken by him were essential for the purpose of assisting him in his escape, the evidence does not show this conclusively. In the evidence for the prosecution it is admitted that all the articles taken would be articles useful to a man situate as was the accused.

I believe that I have a right to draw upon my knowledge of the country in which the accused found himself in deciding whether or not the accused could reasonably consider that the articles taken by him were necessaries.

It is necessary to realize that the man could not get shelter except in a

*80 Canadian Criminal Cases (1943), p. 279.

clandestine way. He was in part of the country where he might reasonably expect to meet with dangerous animals, and while, to the denizen of the country, bears and wolves may not be considered dangerous, they are so considered by those who are without real experience in the bush. Unquestionably the accused was in what is practically a wilderness. He had no legitimate means of securing food, clothing, those things which would be necessary to provide him with fuel and light when needed, and protection against what would be reasonably considered by him danger from wild animals in the country in which he found himself.

It is my opinion that everything which the accused stole from Gould's house or cabin would be necessary, or extremely useful, to the accused in his endeavour to escape from Canada.

It has been suggested to me that once the prisoner escaped from the confinement of the prisoners' camp at Petawawa he was at liberty. In the case of the prisoner, I would think that to say this would be analogous to saying that a prisoner in a penitentiary would be at liberty when he had escaped from his cell, although still within the confines of the penitentiary. My opinion is that the prison of the accused is the domains of the United Nations, and until he passed from those domains he could not be said to be at liberty. I know of no authorities for this proposition, and have been unable to find any. Neither have I been able to find any to the contrary. The proposition appears to me to be a reasonable one. Even if the accused were to be considered as being at liberty, once he escaped from the confines of the prison camp at Petawawa, the question arises as to what are his rights in an endeavour to preserve that liberty.

Our Courts have assumed jurisdiction to try prisoners who are aliens, but in cases such as this, where the accused has been brought within the territorial jurisdiction of our courts, our courts have been careful to differentiate between cases where the alleged offence was committed for the purpose of obtaining or preserving liberty and where it was committed for some other purpose.

I have said that I could find no cases exactly in point and my reason for saying that a differentiation has been made as above is the observations made in *Regina* v. *Sattler*, D. & B. 539, at 541, and *Rex* v. *Stevenson*, 19 Howard State Trials 846. Inferentially this proposition is admitted in the argument by counsel for the Crown in *Regina* v. *Sattler*, and Lord Campbell in that case on page 543 says:

> "A prisoner of war committing murder would be triable; but the question is what constitutes murder? If a prisoner of war who had not given his parole killed a sentinel in endeavouring to escape, would that be murder?"

There is no answer given to the question, but naturally the assumption is that the question would not have been asked if His Lordship had not felt that the prisoner would not be guilty of murder.

In Archbold's *Criminal Pleadings and Practice*, 31st ed., at page 11, it is stated that the liability of an alien is not clearly ascertained. To the like effect is *Russell on Crimes*, 8th ed., page 106.

The Molieres case cited to me should be assumed to be authority for the proposition that English Courts have jurisdiction to try offences such as the accused's. That case, however, cannot be considered to be authority on liability in a case such as this. In that case a French prisoner of war broke into a jewellery shop in London and stole certain articles of jewellery. On his being brought to trial the learned Trial Judge considered it highly improper that he should be proceeded against on the capital charge and directed the jury to acquit him of the capital charge. He was found guilty of a lesser charge, burnt in the hand and confined to prison used for the confinement of French prisoners of war.

It would appear from the observations of Lord Ellenborough, Chief Justice, and by Grose, Justice, in *The King* v. *Johnston*, 6 East 585, at page 593, that the Molieres case cannot be considered an authority. The learned Chief Justice in the Johnston case stated that the Molieres case could not be considered as being agreed to by the court in the Johnston case and that Molieres was guilty of larceny or nothing. The Molieres case seems to show that there was some uncertainty as to the right of our courts to deal with a prisoner of war as if he were a subject.

There is nothing that I have been able to find in the references to the Molieres case to show whether or not what the accused in that case did was for the purpose of facilitating his escape or preserving his liberty. The fact that the articles which he stole were articles of jewellery would seem to militate against the contention that they were so stolen. However, the Molieres case does indicate that our Courts consider a prisoner of war to be in a category different from that of a subject committing an offence against our law.

In all the cases, notably in *Rex* v. *Depardo* and *Regina* v. *Sattler*, a distinction seems to be made between offences committed by a person for purposes of malice or revenge and those committed by a person attempting rightfully to preserve his liberty or to escape from custody from which he has a right to escape if he can.

The only question then is as to whether or not a person such as the accused, attempting to escape, or, having escaped, attempting to preserve that liberty, is punishable for offences against our law if the acts are reasonably necessary or reasonably calculated to facilitate his escape or to preserve his liberty.

In my opinion—although as I have said I can find no authority directly in point—the accused is not punishable at common law for an attempt to escape. He is not punishable at common law for doing anything reasonably calculated to assist in that escape, and in my opinion the same holds for anything done in an endeavour to preserve his liberty once gained.

This accused owes no allegiance to the Crown. He is an open and avowed

enemy of the Crown, a man taken in war and a man who, if it is not his duty, may quite reasonably feel that it is his duty to escape from the domains of his captor state, and, if he can, return to the state to which he owes allegiance and perform his duty to that state.

Whatever may be finally decided in this matter, my opinion is that a prisoner of war is not punishable for anything he may reasonably do to escape, or having escaped, to preserve his liberty. My opinion also is that what the accused did was done with a view to facilitating his escape. He, therefore is not guilty of any crime.

I may say that I regret that this prosecution was not proceeded with by way of indictment so that it could have come in the first instance before a Court of Superior jurisdiction. I sincerely hope that my decision will be appealed and that in future we will have some binding authority in a case such as this. Unfortunately most of the trials in the past have not had this particular point for decision, and unfortunately no Court, so far as I have been able to ascertain, has taken note of this issue at all. In this regard I may refer to the *Depardo* case where, although the matter was reserved for the opinion of the Judges and able argument was advanced to the Court by counsel for the Crown and the accused, no judgment was ever given by the Court, but the prisoner was—by what authority I do not know—discharged.

I have come to the conclusion that the prisoner is not guilty and so must dismiss the charge.

BOOK REVIEWS AND NOTES

Curso de Derecho Internacional Público Americano. By Carlos Sánchez i Sánchez. Publicaciones de la Universidad de Santo Domingo, Vol. XXVI. Ciudad Trujillo, Republica Dominicana: Montalvo, 1943. Bibliography; Index of Names. Pp. xxxiii, 731.

In this large volume Professor Sànchez offers, as a contribution to continental solidarity, an arrangement of American pacts, doctrines, and principles which seem to him to demonstrate that there is a particular structure of American international law, culminating in a system of peace or international democracy which is an expression of the conscience of the American world (p. xvi). An Introductory Part illustrates the economic factor in the American world by a history of Dominican loans from 1869 to 1940 (pp. 43–77) and American territorial situations by the Dominican-Haitian frontier problem (pp. 103–113), which the author thinks can be solved only by an international mandate, necessarily held by Haiti, under some Panamerican organization, perhaps as for a new Liberia, over the primitive tribe-like lowest class of the Haitian population. A history of the formation of an American consciousness (Part I) considers in some detail the various American international conferences, including the three meetings of the American Foreign Ministers (at Panama, Sept. 23–Oct. 3, 1939; at Habana, July 21–30, 1940; and at Rio de Janeiro, Jan. 15–28, 1942); and approves as a Bolivarian ideal the project of a League of American Nations proposed by Colombia and the Dominican Republic at the Panamerican Peace Conference in Buenos Aires, Dec. 1–23, 1926 (pp. 318–323). As positive American public international law (Part II), Prof. Sánchez offers (Chap. I) the American method of peace, meaning an elastic system adjustable to the political and social necessities of each historic moment, for conciliation, coöperation, and solidarity within a Union of American States (pp. 483–487); (Chap. II) the American Doctrines of Washington (Farewell Address), Monroe, Calvo, Drago (with the Porter Modification), Tobar, Irigoyen, and Brum; and (Chap. III) the pacific solution of American conflicts by mediation, conciliation, arbitration, and a permanent supreme court of interamerican justice (p. 687), notwithstanding the failure of the Central American Court of Justice of 1908–1918. (p. 452). The theme of the whole book is presented in the summary of the eight great principles of American international law (pp .689–696), from the Declaration of the Eighth Panamerican Conference, at Lima, Dec. 24, 1938: (1) intervention of one State in the internal or external affairs of any other is inadmissible, (2) all differences of an international character ought to be settled by pacific means, (3) the use of force as an instrument of national or international policy is not permissible, (4) relations between States ought to conform to the rules of international law, (5) respect for and faithful observ-

ance of treaties constitute indispensable bases for the development of pacific relations between States and treaties may be revised only by agreement of the parties, (6) pacific collaboration between the representatives of the different States and the development of a spiritual interchange among the respective peoples tend to better comprehension of the problems of each one and of the problems common to all while at the same time facilitating the pacific solution of international controversies, (7) economic reconstruction contributes to national and international well-being as well as to peace between peoples, and (8) international coöperation is a necessary condition to the maintenance of the foregoing principles. It is difficult to conceive of any theoretical dissent from these generalized and beneficent platitudes (though it may be noticed that they were embodied not in a treaty but in a Declaration which did not have to run the hazards of legislative or public discussion before being approved), but there would seem to be no particular in which they may claim to be peculiarly American rather than ideals for universal international law. It has long seemed to this reviewer that the urge to discover or create a special international law for the Americas, aside from the natural (though usually unspoken) possible motive of seeming to be a larger toad if the puddle is smaller, contains a distinct element of danger. It opens the way for all the tory nations of Europe, Asia, and Africa to point out that if we of America have an international law of our own, we have no common legal base from which to continue to urge their adoption of the various enlightened rules of conduct, including many ideas of freedom, liberty, justice, and democracy, which we have through long years and at great cost established in principle for ourselves and share in varying degrees with England, the former France, Switzerland, the Scandinavian countries and perhaps others, and which we all hope and strive to see eventually universally accepted.

GORDON IRELAND

Manual de Derecho Internacional Público. By Luis A. Podestá Costa. Buenos Aires: El Ateneo, 1943. Pp. 524.

The Professor of Public International Law (since 1919) in the National University of Buenos Aires has sought, in this substantial volume of 28 chapters, to expound as succinctly as possible the institutions of public international law. He has arranged the material under nine main headings (with some novel subdivisions): Preliminaries, International Structure, Objects of International Law, International Relations, Means of Solution of International Differences, International Coöperation, International Organization, International War and Civil Strifes. The work, with 14 notes and no bibliography or alphabetical index, is purposely stripped of contradictory opinions, confusing details and unnecessary complications, being in fact (p. 8) a summary of a more complete work whose publication awaits only finishing touches of detail. To justify publication of a volume upon international law in the midst of a terrible conflagration of humanity the author suggests

(p. 10) that, after this war, the civilized countries will have to organize afresh their living together, a process made ever closer and more solid by material circumstances, but based on antecedent facts and standards, in such manner as to discard the spent and useless but to establish firmly whatever new principles and rules are available. Treatment of the topics is summary and traditional and for the most part uncritical, but mention may be made of a few pertinent or, because of their source, especially interesting suggestions. The principle of autodetermination if applied in every case would give rise to a crowd of sovereignties, which would multiply the causes of conflict (p. 33). Diplomatic pressure and threat of force are irregular; and there is no right of intervention in the affairs of another state, except (1) by a punitive expedition when armed bands cross the frontier and commit depredations which their own state is unable to suppress, and (2) when resident foreigners are attacked simply as such in an upset State (p. 50). The Monroe Doctrine is but a political expression of a unilateral will; but its essential principle of non-intervention, for the strong as well as the weak, should be adopted as a normal basis by all, including the American States, in their international relations (p. 55). The air over land or territorial waters is subject in principle to the State below it, modified by specific treaties (p. 158). The principle of great unfairness, which is a cause for the annulment of contracts in Civil law, is not applicable to treaties (p. 197); but treaties which have become outmoded should be ended or revised by bilateral negotiation, not unilateral abrogation (p. 201). Injuries to foreigners should be compensated on the same basis as injuries to nationals if caused by the constituted authorities, but not those caused by factions, to citizens of whatever nation (p. 202). The European War of 1939 paralyzed the League of Nations but, whatever the course of future events, it is certain that states cannot live in isolation (p. 316). Initiation of war by a surprise attack has grave dangers for the rights and duties of third States as neutrals (p. 331). In case of occupation of a neutral country by one belligerent, the other may consider the theatre of war extended over that territory (p. 340). The taking of hostages from invaded populations, as by the Germans in 1914 and 1939, cannot be considered lawful (p. 365). The territory of a neutral state ought not to be used for the transmission of information of interest to the belligerents or for espionage (p. 415). The grave abuses of the War of 1914 were repeated after 1939 when Germany again established war zones of vast maritime extent, sinking without notice any ships her submarines found therein (p. 455).

GORDON IRELAND

The New Europe. By Bernard Newman. New York; Macmillan, 1943. Pp. viii, 568. Maps. Index. $3.75.

The author of this unpretentious volume addresses himself to the general reader in the belief that only by the pressure of an informed public opinion

can the statesmen at the peace table be made aware of the complexity and importance of their decisions. In arousing interest in specific problems, in setting forth the human factors relevant to each, and in conveying the immediacy of the issues involved, Mr. Newman succeeds admirably. His equipment for the purpose is perhaps unique. After serving in the British Army through World War I, he became a free-lance writer and journalist who made a hobby of bicycle tours on the European continent. In the course of the fifteen summers preceding 1942 he pedalled along the highways and byways of all the countries of Europe and especially those in the East that are often neglected by tourists. His activities as a popular lecturer in the intervening winters and more recently as a staff lecturer for the British Ministry of Information have enabled him to keep closely in touch with the feelings and views of the average Briton. As Mr. Newman would be the first to admit, this volume is not a documented or critical treatment of its subject. Apart from its interest as a piece of reporting, its value for the reader lies principally in its revelation of an average point of view that is likely to have considerable influence.

The scope of the book is more limited than its title would suggest. The principal emphasis is laid upon the territorial problems of Eastern Europe. Separate chapters deal with Poland, the Western borders of the Soviet Union, Estonia, Latvia, Lithuania, Finland, Roumania, Yugoslavia, Bulgaria, Albania, Czechoslovakia, Hungary, France, Italy, and Germany. Poland, Roumania, and Hungary receive the most extended treatment, while France, Italy, and Western and Southern Germany are summarily dealt with. Each chapter includes a brief historical conspectus, some indication of the chief geographical features of the territory, the distribution of the population and its ethnic makeup, the changes in national status during the present war up to the beginning of 1942, various observations on the character of the people and their economic and political habits, and finally an itemized list of proposed changes. Each chapter contains several sketch maps illustrating the successive boundaries and the location of national groups. From internal evidence it appears that most of the book was written in the latter part of 1941.

The main line of Mr. Newman's argument is that territorial problems, often seemingly insignificant in themselves, have been of first importance in causing war; consequently international boundaries must be the first subject of the peace conference; and they should be tentatively drafted now, while disinterestedness is still possible among the two great powers of the West. In his preliminary discussion, the author accepts the frontier arrangements in effect at the beginning of 1938 as the basic framework that should be restored, and the principles of the Fourteen Points and the Atlantic Charter as general guides. In his specific recommendations, however, he departs from these arrangements and principles in several important ways, notably in recommending the cession of East Prussia and Danzig to Poland and of the

Sudetenland and part of the Polish Corridor to Germany. He contemplates the continuance of a number of small sovereign states in Eastern Europe but with a closer correspondence between their territorial and national divisions. In determining the latter he applies the linguistic test as the usual criterion although he takes some account of historical, economic, and other factors. He proposes to make the distribution of nationalities conform to the new state boundaries largely by the transference of populations. Sometimes, although by no means always, he suggests that plebiscites be first taken, either in whole regions as units or district by district. As he considers nationalism the most dynamic political force in Europe at present he doubts the early success of any continental or world-wide international federation and proposes instead a pragmatic, gradual approach.

Many readers will disagree that precedence should be given to the fixing of post-war boundaries before the nature of the governments concerned has been determined. Such a course emphasizes lines of international cleavage rather than the coöperation so badly needed, especially in economic affairs, and jeopardizes the hope of creating an atmosphere in which frontiers may be regarded as zones rather than as permanently fixed arbitrary lines. Since the writing of this book, the attempt of the Polish Government-in-Exile to settle the frontiers of the future Poland has illustrated the unfortunate effects of following this order of procedure.

Some of Mr. Newman's recommendations have a certain unreality because of his underestimation of the Soviet Union. Although he may now have revised his views, the implication of his book is that in settling the boundaries of the Eastern European states the decision will rest with Britain and the United States. But it becomes clearer every day that those two great powers can do little more than concur in, or protest at, the decisions taken by the U.S.S.R. in its borderlands from the Baltic through the Balkans. Mr. Newman's proposals of regional federations in Eastern Europe and the parcellization of Germany seem to lie beyond the scope of practical politics for the Western powers.

Exception will be taken also to the author's proposal of transferring populations on a large scale in order to tidy up the new frontiers. To forestall criticism he explains his own conversion to this method, which he attributes to the remarkable improvement in the relations between Greece and Turkey since the exchange of their nationals after the first world war. No evil can compare with that of another world war, he argues, and "it is far more important that hundreds of millions of people should not suffer or die than that thousands of families should be temporarily inconvenienced." But does he realize that the displacements of population in Eastern Europe outlined in his specific programs might well involve fifteen million people? This is the total suggested by the reviewer's computation based on Mr. Newman's data. Moreover, the movements of population that he proposes are in only a few cases genuine exchanges; in the rest the economic disruption in the ex-

pelling region or the receiving region, or both, would frequently prove disastrous. The analogy of the exchange of Turks and Greeks is inapplicable for another reason. In that instance a barrier of water separated the repatriated groups from subsequent close contact. Among those whom Mr. Newman proposes to redistribute in the lands of Eastern Europe, only the Italians repatriated from Dalmatia will be kept by an equivalent barrier from remingling.

The chapters dealing with Central and Western Europe cover more familiar, though not less controversial, ground; and familiarity is taken for granted in the brevity of the treatment. The disputed frontiers are considered as local problems, and colonial claims are not discussed except in the Mediterranean realm. The proposals for the treatment of Germany lay emphasis on the destruction of the war machine, including the breakup of the German General Staff, the unilateral disarmament of the Central Powers, the dismantling of their armament industries, and the permanent occupation by the United Nations of bridgeheads within the German boundaries.

Mr. Newman does not concern himself with the legal mechanism of administering the post-war world beyond expressing skepticism of any form of international organization that might be quickly set up. He foresees a considerable period of chaos and groping, during which the victorious great powers will presumably furnish an international police and relief force. The necessity for international agreements as to currencies, the control of investment, the industrialization of backward countries, the provision of equal access to raw materials and to markets, and other activities directed toward full employment and the general raising of the level of living is pointed out but not discussed in any detail.

At once the strength and the limitation of Mr. Newman's book lie in his confidence that most problems can be solved by good will and the generous application of energy.

DOROTHY GOOD

The American Senate and World Peace. By Kenneth Colegrove. New York: The Vanguard Press, 1944. Pp. 209. Appendix. $2.00.

Professor Colegrove has written a forthright indictment of the right of one-third of the Senate to reject treaties negotiated by the President. He recognizes that the Senate minority may be by-passed by executive agreements and joint resolutions of Congress, but feels that the possibility of a judicial reversal clouds unnecessarily the confidence of other governments in what we can do internationally.

The anomaly of one-sixteenth of our national legislature being able to block or emasculate great multilateral treaties is brought out from many angles. It is possible for 33 Senators, representing one-twelfth of our people, to defeat a treaty. The immense power of a voter in the small states as compared to those in the large states is graphically illustrated.

The book properly rejects the Gillette proposal of treaty approval by a majority of the whole Senate as only a slight improvement and argues throughout for action on treaties by an ordinary majority of both houses. This is the solution which will ultimately prevail. The book demonstrates that there is no surviving reason for continuing the dangerous veto power of a handful of Senators. Its repeal is difficult, because the same 33 Senators can block the proposal of an amendment in the Senate, but the alternate method of a constitutional convention called by the legislatures of two-thirds of the States is available and the Senate cannot forever defend an anachronism which the people condemn.

Abolishing the Senate veto would at the same time kill the idea that the Senate should act as a check on the Executive and remove any excuse on the part of the Executive for anything savoring of usurpation. The author favors closer relations between the two, but feels that "any tendency toward permitting the Secretary of State to commit the Chief Executive in debates in Congress would be a major disaster to the presidential system. It would diminish the prestige of the President and impair his efficient direction of national policy."

In many places the book brings out the appalling extent to which Senators have placed personal hatred of the President, jealousy, patronage hunting, and partisanship above the welfare of the nation in dealing with its foreign affairs. As one means of counteracting this means of national suicide, Colegrove names the sitting Senators whose past records promise obstruction or facing both ways in the future peace making. He finds a narrow majority for post-war collaboration in the Senate Foreign Affairs Committee and lists 45 Senators whose tactics will bear watching when the post-war settlements come up.

The book is a strong statement addressed to a highly dangerous situation. If the two-thirds vote for treaties is not quite "the irreparable mistake" of the Constitution, as John Hay believed it to be, it is surely the most dangerous clause in it, the one most likely to bring the whole Constitution down in the ruins of a Third or a Fourth World War.

D. F. FLEMING

Requisition in France and Italy. The Treatment of National Private Property and Services. By Maurice K. Wise. New York: Columbia University Press, 1944. Pp. 207. Appendixes. Index. $2.75.

This volume presents a scholarly study of the operation of the power of requisitioning private property in France and in Italy down to 1940. It comprises an examination of the statutes and administrative decrees which gradually enlarged the occasion for and the power of requisition from purely military purposes to all types of public purpose, including, under the Act of 1935 in France, the collateral purpose of checking strikes, a purpose with which American public policy is also flirting. The author discusses the oc-

casions for requisition, both military and civil, the objects of requisition, the nature of private property and services, the procedural requirements for bringing the power into effect, and the remedies available to the victim of irregular or illegal requisition.

France was one of the first countries to establish in the 19th century a balanced relation between the rights of the individual and the necessities of the state. By the enlightened jurisprudence of the Council of State, France gave as much protection to private property against improper requisition or expropriation as does the Fifth Amendment. But it is somewhat saddening to observe that, as the 20th century and the two wars developed, the needs and the impositions of the state became ever greater, until a time came when very little private property was immune from seizure, and the indemnity, as a legal and moral obligation, became somewhat tarnished. Executive price-fixing qualified judicial indemnity in ever greater degree, and when nationalization for social purposes became a public policy, as in the case of arms manufacture, the traditional protections for private property began to weaken.

It is interesting to observe that the advent of the Fascist Government in Italy did not more seriously impair conceptions concerning private property. But in the mere fact that more power was conferred on administrative boards and commissions in Italy than in France the individual probably suffered greater losses. The market value at the time of taking, which became the price criterion for requisitioning in France and which has been the subject of so much debate in Washington, is not prominently featured in Italy. In both countries the necessities of crisis government had some effect in weakening the protections against requisition, although both kept in force the basic laws of 1877 and 1865 respectively. What has happened to the institution since 1940 is unknown but, judging by the threats of earlier years, optimism is not justified.

The author is to be commended not only for his analysis of the statutory development in both countries but for the social comprehension involved in a study of private and public relations basic to the existence of western civilization. If the power of requisitioning private property and personal services is over-balanced in favor of the state and to the detriment of the individual, existing legal institutions themselves are endangered.

EDWIN BORCHARD

Canadian-American Relations, 1875–1911. By Charles C. Tansill. New Haven: Yale University Press, 1943. Pp. xviii, 507. Index. $3.50.

This volume deals with Canadian-American relations from the point where Professor L. B. Shippee's earlier study, *Canadian-American Relations, 1849–1874*, terminated, and brings the story down to the Reciprocity Treaty of 1911. The author has chosen a topical rather than a chronological method of presenting his material. He has selected four main subjects for detailed analysis: the North Atlantic Fisheries controversy (four chapters), the Alaskan Boundary dispute (five chapters), the Fur-Seal arbitration

(three chapters), and the movement for Commercial Union (two chapters). Other aspects of Canadian-American relations are omitted altogether or given the briefest mention, so that the treatment is intensive rather than extensive.

The ground which Professor Tansill covers has been well trodden before but, because of his meticulous research into new source materials, his work is a real contribution to the literature in this field. He has not only made use of the Macdonald and Laurier Papers in the Canadian Archives and the State Department papers in Washington but has also had access to the private papers of such leading American figures as Bayard, Choate, Cleveland, Theodore Roosevelt, Root, and others. His narrative, and particularly his footnotes, are larded with comment and personal observation which illuminate the devious diplomatic processes under analysis. The inside story of the Alaskan Boundary Tribunal meetings in London, with an almost play-by-play commentary on the leading figures, is of especial interest in illustrating, on the one hand, Roosevelt's "big stick" diplomacy and, on the other, the British dilemma when confronted with a conflict between American imperialism and Canadian nationalism. In this case the Canadians, clothed in the thin dignity of the under-dog, appeal more by their helplessness than by the justice of their claims.

Now that economic collaboration between Canada and the United States has found new meaning and scope in a joint war effort, it is instructive to read of the prolonged and vain efforts to achieve Commercial Union and Reciprocity during the period covered by this volume. Professor Tansill has devoted less space to the story than it perhaps deserves, and has not sufficiently related the purely North American aspects of the movement to the wider American-Canadian-British relations. The rise of the British preferential system is a part of the whole story but little developed here. The timorous nationalism in the Canada of the end of the century could be more easily frightened by the possible results of close coöperation than would be possible today.

Perhaps worth mentioning, as an example of North-American neutrality in a European war involving North American powers, is the author's reference to the agreement between the Hudsons' Bay Company and the Russian-American Company by which their joint possessions along the Northwest Pacific coast, with the consent of the two Governments concerned, were neutralized during the Crimean war. Britain and Russia allowed this portion of their territories to remain outside the general conflict.

F. R. SCOTT

Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference, 1919. Vols. III and IV. Published by the Department of State. Washington: Government Printing Office, 1943. Pp. iv, 1062; iv, 880. Indexes. $2.00 each.

Following the appearance in 1942 of the first two volumes on the Paris

Peace Conference of 1919,[1] publication by the Department of State of the third and fourth volumes in this series provides additional valuable material on the problems of peace making after a world war. In the two new volumes directories (of personnel) take up about 150 pages, minutes of plenary sessions of the Preliminary Peace Conference about 250 pages, minutes of plenary sessions of the Peace Congress 32 pages, minutes of the meetings of the Powers with Special Interests 20 pages, minutes of the meetings of the Council of Ten (Jan. 12 to June 17) more than a thousand pages, and minutes of the meetings of the Council of Foreign Ministers about 350 pages. In some instances, where texts of documents are not completely reproduced, there are cross references to other printed sources.

President Wilson expressed the view that this was, in a sense, the "supreme conference in the history of mankind" (Vol. III, p. 165), one whose members were "not representatives of Governments, but representatives of peoples" (Vol. III, p. 178). At the initial session of the Preliminary Peace Conference President Poincaré told the assembled delegates that "What gives you authority to establish a peace of justice is the fact that none of the peoples of whom you are the delegates has had any part in injustice" (Vol. III, p. 159).

Before the Conference were questions, among others, of representation (including that of the representation of women), of publicity to be given to the discussions, of boundaries and frontiers, of reparation (including restitution in kind), of forcing German compliance with the armistice terms, of possible discussions with Soviet Russia, of disposing of private property of enemies, of arranging trusteeships for backward peoples, and of devising an international organization which some thought would bring about, in the language of a Panamanian spokesman, "the birth of a positive international law" (Vol. III, p. 304). That there was sharp disagreement on some of these matters was, of course, known long before the appearance of these published records. On one occasion, when discussing the question of mandates, in the Council of Ten, President Wilson observed that he "had been accused of being a hopeless idealist, but . . . he never accepted an ideal until he could see its practical application" (Vol. III, p. 788). On another, when the discussion related to military and naval terms to be imposed upon Germany, M. Clemenceau said he thought that to put a question as President Wilson had just done would be putting it "in an academic, theoretical, and doctrinal light" (Vol. III, p. 974).

The essential nature and form of international law became the subject of discussion (Vol. IV, p. 575) in connection with rules of prize law and proposed treaty clauses concerning the finality of national prize court decisions (Vol. IV, pp. 482, 563–64, 573, 575). Among the matters of substantive international law which received attention were those relating to belligerent rights as to private property in general (Vol. IV, p. 465) and particularly as

[1] Reviewed in this JOURNAL, Vol. 37 (1943), pp. 535–536.

applied to enemy-owned cables (Vol. IV pp. 226–28, 254, 466–70, 483–500), Holland's alleged violation of neutrality in allowing transit rights to Germans (Vol. IV, pp. 731–2), the effect of war upon preëxisting international agreements such as the Act of Algeciras (Vol. IV, pp. 128, 181), the retention of enemy hostages (Vol. IV, pp. 636–37), and German claims in the Antarctic (Vol. IV, pp. 555, 565). There were complaints from the Germans because of the continuance of the blockade and the non-return of Germans whom the Allies held as prisoners of war, and, on the other hand, various statements on such matters as the scientific destruction by the Germans of the industries of France (Vol. III, p. 976.) and mistreatment of prisoners whom the Germans had taken (Vol. III, pp. 470–71, 479, Vol. IV, pp. 631–32).

Parallels between the situation which peace makers faced in 1919 and that which will confront the leaders of the United Nations at the end of the current war do not require extended discussion. It is to be hoped that the remaining volumes on the Paris Conference will soon be available.

ROBERT R. WILSON

Documents on American Foreign Relations, July 1942–June 1943. Edited by Leland M. Goodrich and Marie J. Carroll. Boston: World Peace Foundation, 1944. Pp. xxxv, 735. $3.75.

It is difficult to see how any student of the foreign policy of the United States and its role in the family of nations could well get along without this excellent compilation of documents. It is true that subscribers to *The Department of State Bulletin* have already had access, and that, too, week by week, to nearly 53 percent of the material presented in the 706 pages of this text, but here even that material has been made more readily accessible by its convenient arrangement under topical headings and its integration with a mass of other relevant documentary material garnered from a variety of sources, such as, to mention only a few, the *Congressional Record* and other Congressional publications, the *Federal Register*, the Office of the Secretary to the President and other governmental agencies, and the *New York Times* and other periodicals.

The documents have been arranged under the following twelve main headings: Principles and Policy; Defense and the War Effort; The Axis Powers; The United Nations; The Western Hemisphere; Eastern Asia and the Pacific Area; Europe, Africa and Western Asia; Trade and Finance; Transportation and Communications; Treatment of Persons; The Department of State and the Foreign Service; and International Organizations. There are many well-chosen sub-heads under each main heading. One or two of the documents antedating the period covered (such as the Final Act of the Inter-American Conference of Police and Judicial Authorities), which were not available for inclusion in the preceding volume, are included here.

It is a pity that no official source (instead of even such reliable unofficial sources as the *Christian Science Monitor* and the *New York Times*) was

available for such important items as President Roosevelt's remarks interpreting the results of the Casablanca Conference, President Roosevelt's remarks concerning Anthony Eden's visit to Washington, President Roosevelt's statement concerning the employment of aliens, French High Commissioner Admiral Robert's note to Secretary Hull, and Ambassador Standley's statement on American aid to the Soviet Union.

Among the topics of special interest to readers of this JOURNAL which are covered by the documents are: trading with the enemy; treatment of enemy aliens, enemy property, prisoners of war and interned civilians; punishment of war criminals; alleged violations of the laws of war (including the opinion of the United States Supreme Court in the saboteur cases); relinquishment of extraterritorial rights in China; the service of nationals of one country in the armed forces of another country (16 executive agreements); jurisdiction over criminal offenses of the armed forces; detail of United States officers to assist the Governments of the Latin American Republics in military and naval matters; and foreign fund controls. There is also documentary coverage of the basic principles of collaboration of the United Nations, lend-lease operations, OFRRO and UNRRA, the United Nations Conference on Food and Agriculture, and the Casablanca Conference. Included likewise are the chief relevant statements of Churchill, Stalin, Giraud, and de Gaulle and the memorable address of Madame Chiang Kai-shek to the House of Representatives.

The editors have supplied scholarly head-notes under many of the headings giving the background of the documents printed thereunder and illuminating footnotes (even a definition of a "zoot suit" on page 446) as well as appropriate footnote references to relevant items in preceding volumes of the *Documents*. The index is exceptionally good.

HERBERT WRIGHT

S. O. Levinson and the Pact of Paris. By John E. Stoner. Chicago: University of Chicago Press, 1943. Pp. xvi, 368. Documents. Index.

This work should be made compulsory reading for all students of international law and organization. The processes by which international institutions and international law come into existence have been grossly neglected by students of the law, in particular the processes whereby multipartite conventions for the creation of new institutions and the establishment of new principles are conceived, promoted, and adopted. We have one other study of such an incident, in the fascinating first chapter of Asher Hobson's monograph on the International Institute of Agriculture, but that is a much briefer treatment. Whether one believes the Pact of Paris to be a very valuable or a very dubious contribution to progress in international law and order—this reviewer leans toward the latter view—the present volume gives a penetrating picture of the elements which led to its conclusion. Those elements include general historical forces, both economic and

social, more special political factors in the international sphere and in individual countries, and above all factors of personality and personal motives, particularly those of some twenty or thirty Americans in various walks of life. Few of these are sufficiently free from pettiness and selfishness to be wholly admirable, and the fantastic mixture of diabolical technique and saintly aim in Levinson himself is almost overwhelming. One knew, of course, that the improvement of our international legal and political structure depended largely on the coördination of just such factors, many of which in themselves were mainly selfish if not wholly cynical. But such a glaring exposure of the process as Dr. Stoner has given us here—under Professor Quincy Wright's direction—is more than a little frightening. If it does not make us despair of seeing anything good come out of the activities of the Churchill-Roosevelt-Stalin trinity in the present situation, not to go further down the scale, at least it has infinite light to throw on the many bewildering facets of the problem.

P. B. P.

NOTES

The Thomistic Conception of an International Society. By Gerald F. Benkert, O.S.B. Washington: Catholic University of America Press, 1942. Pp. xii, 193. The author of this dissertation has done a valuable service in seeking to apply the philosophical teachings of St. Thomas to the problems of international organization with which the world is now confronted. Not content with adding one more to the numerous studies already made of the scholastic doctrine of the "right of war," he has sought to draw from the moral principles of Thomistic philosophy definite and concrete conclusions with respect to the nature and functions of a society of states under the conditions of the present day. Starting with the teachings of St. Thomas upon man, society, and the state, and guided by Francis de Vitoria and other later Thomists, the author builds up the conception of an international community, a Christian commonwealth, whose purpose is to maintain and to promote the mutual welfare of all its members. There must be "authority" in the international society, authority which, in the words of Vitoria, resides "in the common accord of the associated nations." Judicial institutions are needed; but they are not enough. There must be the power to legislate, "to direct the activities of the members of the society of states to the universal common good by means of law"; and there must be coercive power to enforce the law, taking shape in sanctions. "Sovereignty" is put in its proper place, the right of the state to promote the interests of its own people, but subordinate to the common good of the international community. Nationalism and internationalism are reconcilable when each operates within the field appropriate to it; their specific ends and functions supplement rather than oppose each other; and both are elements of an "integral political order."

C. G. FENWICK

No Nation Alone. By L. R. Fike. New York: Philosophical Library, 1943. Pp. 96. This little book outlines a plan for world organization based on the idea of a humanitarian business enterprise. This is not sur-

prising because Lt. (j. g.) Lewis R. Fike, the author, is a lawyer especially interested in agricultural coöperatives. His plan sets up a "World Security Institute" composed of seven commissions which shall control all of the relations between nations. The Hearing Commission corresponds roughly to the present Court for International Justice and would have control of legal problems. The Military Commission would have the policing function to enforce the orders of the Hearing Commission, and would maintain armed forces for that purpose. The other five commissions are designed to handle all those troublesome problems of economics, finance, and minorities which may cause symptoms of war. Specifically these commissions would be empowered to regulate the commerce between nations, to dominate all the world currencies so as to keep them in balance, to take over any disputed territory, or to assign such territory to a certain country, and to carry out many other useful and important functions. The only trouble with this interesting analysis is that it is politically entirely unrealistic. It is fanciful to think that in the near future the big four nations are going to turn over their entire armed forces to such an Institute and give up the control of their national defense to any international groups. Neither are the big four nations, least of all our own, going to submit to the economic planning envisaged in a bureaucracy which would tell a nation how much of what it may produce and export, and set the prices to be obtained. There are many wise and interesting suggestions in this book but there would not seem to be the slightest possibility that any great part of the plan could actually be adopted.

PHILIP C. NASH

Lend-Lease: Weapon for Victory. By E. R. Stettinius, Jr. New York: The MacMillan Company, 1944. Pp. xiv, 331. Appendices. Index. $3.00. This book, written by the author while Lend-Lease Administrator and before his appointment as Under-Secretary of State, is essentially an account of Lend-Lease operations. The legal, moral, constitutional, and international aspects of the problem will receive much attention in the future, both from the statesman and the scholar. Mr. Stettinius has wisely limited his observations to the here and now. He assumes Lend-Lease to have been essential to our interests and security before we entered the war, to be absolutely essential to victory, and to be an important part of the economic warfare we are waging against the Axis powers. He does not argue these points and thus saves himself and the reader much difficulty.

As a background to the discussion, the author has described our policy under the "cash and carry" provision of the so-called Neutrality Act, the effect of Dunkirk and the fall of France on our security, the implications of the destroyer-base agreement, the provisions of H.R. 1776 and the debate on Lend-Lease, together with the final enactment of the law.

Describing our course while fulfilling the function of the "arsenal of democracy," Mr. Stettinius has shown how Lend-Lease aid began and how seven billions of dollars were set to work in behalf of ourselves and of the anti-Axis powers. Planes and trucks were sent to China. The effect of Germany's attack on Russia is set forth. British and American action in getting Lend-Lease materials through the sea and air lanes was a grand effort, nobly conceived and effectively executed. Then came Pearl Harbor, which changed the legal and diplomatic basis of our participation as well as the form and procedure of our contributions.

The substance of the volume, however, lies in Part IV, which is entitled

"The United Nations." Herein the author deals with Lend-Lease materials destined to Japanese defeat, supplies sent the Soviet, the Administrator's visit to war-time Britain, reverse Lend-Lease, combined operations, and the stake of the United States in Lend-Lease. Starting the volume with the formula "pattern for victory," the author concludes by regarding Lend-Lease as a "weapon for victory."

The problem of a short review of a "landmark" book is the selection of those subjects which might be of outstanding interest or which might provide a basis for discussion. The author has served, figuratively speaking, pure steak to his reading public, with all bones and foreign material removed. Dealing with operations, and with facts and events, rather than with policy and theory, it is essentially a volume which has grown out of the experience of the author, and therefore is not to be discussed or appraised in the manner of books based on "footnote" research. In his several appearances before the committees of the Congress conducting hearings on Lend-Lease appropriations, Mr. Stettinius has eloquently elaborated his theories on Lend-Lease and has resolutely defended Lend-Lease policies for the Administration. His leading contribution and interest are to be found, however, in administration; in Lend-Lease as in other matters of government, "that which is best administered is best."

To the reviewer the most significant portions of the book are those which deal with the concept and practice of Lend-Lease as an instrument of national policy, whether we were neutral or at war; the initial distribution of materials; the sending of supplies to the Soviet Union; Lend-Lease in reverse; and aid to the governments-in-exile and the undefeated, but occupied countries.

In breaking down the Lend-Lease materials from the beginning to the middle of 1943, as regards commodities and countries, the author reveals concretely the nature of Lend-Lease transactions. Almost 13 billions of Lend-Lease aid was expended during this period, and about half of it was devoted to essentially military materials, while the residue was spent on raw materials and industrial equipment, food and other agricultural products, and shipping, ship repairs, factories and other services. This, he admits, "is a lot of money." Have we got our money's worth? The total impact of Lend-Lease on our economy is relatively small, varying as to commodity or service. Its dividends have been great. Had Britain gone under, Hitler isolated Russia, Japan completed her conquest, and we been left alone in this hemisphere, and had the Axis dominated the world, we have a picture, says the author, of what would have happened without Lend-Lease.

In conclusion, in establishing Lend-Lease as one measure of American collaboration, and as a weapon for victory, Mr. Stettinius describes it as the basis of post-war economic collaboration, especially under the conditions set forth in Article VII of the Master Lend-Lease Agreement. This Article is as basic in the economic freedom of the world and in the relations of the free national economies as are the economic sections of the Atlantic Charter and other fundamental instruments of the peace which is to come.

Problems remain which are beyond the author's present interest. How shall Lend-Lease be adjusted and liquidated? Shall we ask payment in full? Shall we exact the "pound of flesh"? Shall we ask for a partial settlement? Or shall we cancel the entire transaction? Clearly, the outside world will be united in not admitting any moral obligation to repay the United States in respect of Lend-Lease transactions. Should we ask for the

return of such remaining goods as we want and need, and cancel out the rest? Should it be a bargaining weapon for a privileged economic and political position for the United States? If nations repay, with what will they compensate us?

Lend-Lease seems to raise as many problems for the future as it now solves. Perhaps Mr. Stettinius, then as now, will be in a position to point the way of national interest, international coöperation, economic security, and political stability. All these and more are bound up in this great concept. For this definitive account, the official and unofficial, the public and private, individuals and groups concerned with the war and the peace are under deep obligation to the author.

CHARLES E. MARTIN

War and Peace Aims of the United Nations. Edited by Louise W. Holborn. Boston: World Peace Foundation, 1943. Pp. xv, 730. $2.50. *United Nations Agreements.* Edited by M. B. Schnapper. Washington: American Council on Foreign Affairs, 1944. Pp. xxx, 376. $3.75. *Symposium on Post-War Problems.* Philadelphia: American Philosophical Society, 1943. Pp. 77. $1.00. Three recent contributions to an understanding of postwar international reconstruction deserve a place on the shelves of the expert and the citizen alike. Two are highly useful documentary collections, one a symposium covering a wide range of political, economic, and social problems. The title of Miss Holborn's volume exactly states its contents. The period covered runs from September 1, 1939, to the end of 1942. The documents included are all official statements, international treaties, and agreements, unilateral declarations, and other governmental statements, and statements of responsible government officials. The quotations vary from two or three lines to a dozen pages and are carefully cited and cross-referenced. Over half of the book is devoted to the United States and the British Commonwealth; nowhere else, however, is there available in English as full a record for the Union of Soviet Socialist Republics, China, the Occupied Countries, and the Latin American Republics. Two useful appendices include statements of war and peace aims by the churches and by political parties in the United States and Great Britain. The useful headnotes give an abbreviated, almost elliptical, statement of governmental structure and a record of major war events for each country; they might well have been expanded both in number and content. No other volume is likely to supplant this one, however, as a useful reference work on wartime statements as to what the United Nations are seeking to achieve from victory in the postwar world.

More restricted in scope (to official inter-governmental agreements), but more complete in detail, Mr. Schnapper's volume covers the war period to the end of 1943. Carefully referenced and cross-indexed, it is a definitive and invaluable collection for everyone concerned to know how the structure of postwar international organization is being forged during wartime. The fourteen pages in the subject index run from aeronautical coöperation to western hemisphere coöperation; agreements relating to twenty-five "going" international administrative agencies are included. For most of the agreements brief headnotes and footnotes serve as links to the course of events out of which they were forged. The volume underlines the fact, as Arthur Sweetser points out in a brief foreword, that "the United Nations [are] on the march to some kind of new world association and integration." The progress already made in that direction, portrayed in the actual agreements now in force among the United Nations (some concluded since this volume

was published) is a lesson both of hope and of the practical capacity of leaders in many countries for democratic Realpolitik.

The eleven papers read before the American Philosophical Society by Americans and Europeans cover a wide range of topics, some detailed and domestic, others general and international, in scope. From "Panama Canal Revenues and Finances" to "The Problem of Self-Determination" the authors discuss various facets of postwar problems historically and analytically. All the papers are rich in insight, in the portrayal of the implications as well as the data of the issues treated—race and population, nutrition, monetary stabilization, sovereignty of small states, economic postwar planning in both its transitional and long-range aspects. The volume is significant more for the experience and reputation of the individual authors in their special fields than for its coherent unity of outlook or approach.

PHILLIPS BRADLEY

Czechoslovakia in European History. By S. Harrison Thomson. Princeton: Princeton University Press, 1943. Pp. 390. $3.75. The history of the Czechoslovak Republic and its origins, as well as the legal status of the present Czechoslovak Government-in-exile, offer a tempting opportunity for discussion from both the constitutional and the international law standpoints. It is a field still largely unexplored except by propagandists lacking objectivity. Undoubtedly it is too much to expect Mr. Thomson to deal definitively with problems of importance to international and constitutional lawyers. As a history for the earlier periods the work is satisfactory, although necessarily rather general. When, however, we come to recent political history and the twenty-year vicissitudes of the Republic, there is an absence of sources which should not have been overlooked. As to Masaryk's pre-1914 attitude, the first President's own works are very revealing but no adequate use of them has been made. Pekar's critical study of Masaryk's philosophy of Czech history is not referred to. Dr. Albin Bráf's chapter on Masaryk in Bráf's memoirs is not mentioned. Denis, the French historian of Bohemia, has an interesting criticism of Masaryk's "realism," but Mr. Thomson does not seem aware of it. As for the years from 1914 to the present, Mr. Thomson has clearly made use only of governmental sources. The result is an incomplete and at times a misleading picture.

CHARLES PERGLER

British Economic Interests in the Far East. By E. M. Gull. New York: Institute of Pacific Relations, 1943. Pp. viii, 272. Index. $3.00.

British Far Eastern Policy. By G. E. Hubbard. New York: the same, 1943. Pp. xii, 97. Appendices. Index. $1.25.

These two books by British authors on the concerns of the British in the Far East were prepared independently and can be read without reference to each other; as they supplement each other nicely they can also be read together, however. Mr. Gull's book is a treatment of economic interests. He states in the Foreword, however, that his purpose is to provide a background for an understanding of government policy. With a high degree of skill he guides the reader through a maze of factual detail. Mr. Hubbard's book is an analysis of government policy. That policy has pivoted, he finds, upon the preservation of China's integrity, not from any altruistic motive but because it has accorded with British interests.

Both books follow a familiar pattern. They trace developments historically from the pre-treaty period into that which followed the attack upon

Pearl Harbor. The scope of each is the Far East as a whole, but both deal primarily with China. This is accounted for in part by the magnitude of British interests in that country and in part by the clash of interests there that led to war with Japan.

Each author writes from a vantage point that suggests that he may well have something to say. For many years Mr. Gull, as he indicates in the text, served as Secretary of the British Chamber of Commerce at Shanghai. Mr. Hubbard is Far Eastern Research Secretary of the Royal Institute of International Affairs. The American sponsorship of the two books further suggests that the books have met rigid tests of sound scholarship and objective analysis. They nevertheless leave the impression that they are British books on British subjects by British authors, and they smack of a British flavor; they are, of course, none the less savory on that account.

Unavoidably or not, they build a case. Mr. Hubbard, for instance, points to two occasions when an American *démarche* came just too late to stiffen resistance when Great Britain, in imminent danger of attack, gave way to pressure from Japan. On July 24, 1939, Great Britain concurred in the Craigie-Arita formula which came dangerously near to recognizing Japanese belligerent rights in North China. Two days later the American Government gave notice of its intention to terminate its commercial treaty with Japan. The agreement to close the Burma road was made public July 18, 1940. One week later the United States restricted the export of essential war materials to Japan. Had Great Britain had the support of the American action before rather than after these critical junctures it might well have successfully resisted the pressure from Japan. In like vein Mr. Gull points out that he could find no greater disposition on the part of the United States before the Washington Conference to dissociate itself from the treaty-port system than Great Britain had shown. By building a case in support of British policy in the Far East, these books demonstrate, however, that such a case can be built.

RALPH A. NOREM

The Idea of Nationalism. By Hans Kohn. New York: Macmillan, 1944. Pp. xiii, 735. Index. $7.50. Nationalism, one of the most troublesome phenomena of our contemporary civilization, has received a great deal of attention. Everywhere, to a growing degree, it has decisively influenced the political, economic, and cultural life of all men. Yet so far few books have attempted to trace comprehensively the rise of the idea of nationalism, to analyze its content, and to discuss its world-wide implications. Kohn's contribution is the best and most exhaustive research into the origins of modern nationalism, covering the subject from the days of the Hebrews and Greeks to the eve of the French Revolution. The emphasis is not laid upon events, which are for the most part well known, nor upon the accumulation of complete evidence, but upon their interpretation and evaluation in the chain of history. In the infinite number of occurrences, in the endless complexity of the interaction of causes and effects, personalities and conditions, passions and accidents, many tendencies and trends can be discerned which integrate history into a comprehensible pattern. Nationalism as one of these elements is analyzed by Kohn, using a comparative method. "Only comparisons of different nationalisms all over the earth will enable the student to see what they have in common and what is peculiar to each, and thus allow a just evaluation."

Kohn is not only an able historian. The master of several foreign lan-

guages, he has utilized an impressive number of studies of nationalism in various languages, synthesizing them and evaluating them in "Notes" of 131 pages. His work is based on wide research. It corrects many minor errors of other writers and presents a clear and straightforward picture of its subject. In short Kohn has fulfilled his self-appointed task not only with vividness, sensitiveness, and deep truth, but, one must note, with a magnificent virtuosity in the management of his material. His is the best study of the ideological roots of nationalism available in English or in any other language.

JOSEPH S. ROUCEK

Searchlight on Peace Plans. By Edith Wynner and Georgia Lloyd. New York: Dutton, 1944. Pp. ix, 532. Pictographs. Maps. Glossary. Index. $5.00. The object of this book is "to present an unbiased survey of plans for a governed world so that those who want supra-national organization may examine existing plans and support their choice with full knowledge of its advantages and disadvantages as compared with other possible methods." In a large measure this purpose is achieved with the outlining of the essential features of some two hundred specific proposals to unite the nations. A brief Part I defines the basic issues involved in the problem of international organization. Part II, endeavoring to demonstrate that there is "nothing new under the sun," presents an amazing variety of plans from 1306 to 1914, including, among many others, the ideas of Hugo Grotius, William Penn, Jeremy Bentham, Napoleon Bonaparte and Simon Bolivar. Part III sets forth uniform charts of modern theoretical plans such as those of Rosika Schwimmer, Clarence Streit, S. R. Chow, James T. Shotwell, and others, and gives the official text of many documents such as the Atlantic Charter and the Moscow, Teheran, and Cairo Declarations. Parts IV and V describe briefly the various practical attempts at a governed world; the evolutionary stages thereof are effectively highlighted. Many valuable charts of existing confederate and federal constitutions are furnished. Unfortunately, "The International Law of the Future—Postulates, Principles and Proposals," appearing in the April issue of this JOURNAL, was not published in time to be mentioned in this encyclopaedic volume. Each plan is synopsized in non-technical language in textbook fashion, but in many cases the source material is given so that the interested reader can easily discover the details for himself. Purposely, very little critical comment is offered by the authors, but, with its well prepared index, the book is an excellent and convenient tool for a quick comparison of the various peace plans, and can be of great service for the possible integration of their better features into a comprehensive whole. It is definitely a worth-while contribution.

ALBERT E. KANE

Summary of Congressional Proceedings of general interest compiled from the Congressional Record of the United States of America. Toronto: Oxford University Press, 1944—. Vol. I, No. 1, September 1943–January 1944. Pp. vi, 146. Appendix. $1.50. This is a new publication, intended to be issued quarterly, designed to parallel the *Journal of the Parliaments of the Empire* (same publisher), and to give a summary of the proceedings of general interest in the Congress of the United States of America. It is based on the idea that such a summary would be useful to Parliamentary representatives of the English-speaking democracies. In this first number materials are included dealing with coöperation for world peace, the Moscow

Conference, ratification of treaties, and one or two other items. The Appendix contains information on the organization and functions of the Congress, resolutions introduced in the Senate, and other matters—national and international, official and unofficial. If the principle underlying the Interparliamentary Union is sound, as it would seem to be, such a publication should be justified and prospectively most useful to the Empire parliamentarians. It might also be useful to citizens of the United States, both in rescuing them from the enormous bulk of the Congressional Record and in letting them see how they look to other people(s)! Perhaps the anonymous Editor will not resent a few words of caution, however. If he selects only matters of foreign or British interest he may give a very false picture of the proceedings of the Congress. If he indulges in sub-headings too freely (p. 96, e.g.) he may give misleading impressions. And if he makes use of too many private documents or opinions (pp. 141, 142) he may be still more tendencious. Apart from such variations this should be a very interesting publication.

P. B. P.

The Soviet Far East. By William Mandel. New York: The Dial Press, 1944. Pp. 158. Maps; tables; appendixes. $2.50. It has been a matter of common knowledge that the Soviet Union has expended superhuman efforts, material, and equipment during the past three years to industrialize the Soviet Far East. Especially has it been active in cultivating the hinterland of Siberia and adjacent areas and in making it a source of supply of agricultural food products. On the basis of all available reports it seems that, even during the past two years, while the Soviet Union has been engaged in the most savage and atrocious battles to drive out the Nazi invaders, the economic and agricultural development of the Soviet Far East has proceeded uninterruptedly on a gigantic scale. Spasmodic reports in recent Soviet journals would seem to indicate that the industrialization as well as the agricultural growth of that area have been carried forward on such a vast scale as almost to triple the speed with which the First and Second Five Year Plans were carried out in the Ukraine and behind the Ural area. It is regrettable, however, that Mr. Mandel has compiled here only information already generally well known. The book consists largely of reprints of articles which the author has published in various journals in this country, especially in the monthly *Soviet Russia Today*, by no means an impartial journal. Moreover, about one-third of the book is devoted to lengthy quotations from articles which appeared in *Pravda* and *Izvestiya*, especially panegyrics of the Stalin regime. One wonders why a study ostensibly designed to present factual data bearing on the Sovietization of the Far East should be replete with phrases such as the following: "Unable, by their own admission, to come out as open opponents of the Soviet system because the people had been won to the support of that system, the bourgeois nationalists could not prevent, but only retard, the development of Central Asia" (p. 118). Similarly, in the chapter entitled HISTORY, the author traces briefly the historical development of the Soviet Far East strictly according to the Party Line. Mikhail Frunze is presented as the founder of the Red Army, but Leon Trotsky is not mentioned at all, nor are the other Founding Fathers of the Soviet Union mentioned. It is also to be regretted that the author fails to refer to standard works on the subject such as *The Economic Geography of Asia* by Daniel R. Bergsmark. The reviewer is at a loss to understand why The Institute of Pacific Rela-

tions has undertaken to sponsor an "inquiry" which abounds with statements such as: "This was the case in Uzbekistan where, as recently as 1934, one-third of the members of the Communist Party—who usually are the most socially-conscious and, generally, best educated members of the community—were illiterate" (p. 125).

CHARLES PRINCE

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* Mention here neither assures nor precludes review later.

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WILBUR S. FINCH

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UNITED NATIONS

RELIEF AND REHABILITATION ADMINISTRATION

Resolutions and Reports (selected) of the First Session of the Council, December 1, 1943

RESOLUTION NO. 1

A RESOLUTION RELATING TO THE SCOPE OF THE ACTIVITIES OF THE ADMINISTRATION

Resolved

That the following shall be the broad policies of the Administration with respect to the scope of its activities:

I. Areas in Which the Administration Will Operate

The exact geographical areas in which the Administration will operate and the kind of operations it will undertake in each case must be determined by the Director General (in the light of policies laid down from time to time by the Council) only after consultation with, and with the consent of, the government or authority (military or civil) which exercises administrative authority in the area. The Administration's activities in seeking to achieve the objectives referred to in the preamble of the Agreement setting it up will be governed as follows:

1. In the case of a liberated area in which a government or recognized national authority does not yet exercise administrative authority, the Administration will operate from such a time and for such purposes as may be agreed upon between the military command and the Administration, and subject to such control as the military command may find necessary. The Administration shall, so far as circumstances permit, seek the advice of the government or recognized national authority concerned.

2. In the case of a liberated area in which a government or recognized national authority exercises administrative authority, the Administration will operate only after consultation with, and with the consent of, the government or recognized national authority concerned regarding the form of activities to be undertaken by the Administration within the whole or part of such area.

3. If it appears necessary for the Administration to operate in an enemy or ex-enemy area in carrying out the purposes of the Agreement, it will do so only from such a time and for such purposes as may be agreed upon between the military command, the established control authority or duly recognized administration of the area on the one hand and the Administration on the other, and subject to such control

as the military command or the established control authority may find necessary; provided that the Council approve the scale and nature of the operations it is proposed to undertake and the standard of provision, and that all expenses connected with such possible operations in an enemy or ex-enemy area should be carried by the enemy or ex-enemy country concerned. The Director General will consult with the military command or established control authorities having control of enemy or ex-enemy areas with a view to securing information as to any surpluses of supplies from time to time available in such enemy or ex-enemy areas from which relief and rehabilitation import requirements of liberated areas might be met.

Nothing in the above should be taken as preventing the Administration from carrying on activities in other areas in order to perform the tasks laid upon it in the Agreement, provided that the government or authority (military or civil) exercising administrative authority in the area concerned agrees.

II. The Range of Services Which the Administration Will Provide

The supplies and services of which the Administration will seek to insure the provision fall under four heads:

1. *Relief supplies:* essential consumer goods to meet immediate needs, such as food, fuel, clothing, shelter, medical supplies.
2. *Relief services:* such as health and welfare; assistance in caring for, and maintaining records of, persons found in any areas under the control of any of the United Nations who by reason of war have been displaced from their homes and, in agreement with the appropriate governments, military authorities or other agencies, in securing their repatriation or return; and such technical services as may be necessary for these purposes.
3. *Rehabilitation supplies and services:* materials (such as seeds, fertilizers, raw materials, fishing equipment, machinery and spare parts) needed to enable a recipient country to produce and transport relief supplies for its own and other liberated areas, and such technical services as may be necessary for these purposes.
4. *Rehabilitation of public utilities and services:* so far as they can be repaired or restored to meet immediate needs: such as light, water, sanitation, power, transport, temporary storage, communications, and assistance in procuring material equipment for the rehabilitation of educational institutions.

III. Relation of the Administration With Existing Intergovernmental Authorities and Agencies Established to Deal With Supplies, Shipping, and Related Questions

1. The activities of the Administration in bringing assistance to the vic-

tims of war will be so conducted that they do not impede the effective prosecution of the war. The prosecution of the war demands that scarce supplies and shipping tonnage shall be carefully controlled and allocated in order to assure not only that the supplies and shipping requirements of the armed forces are fully met, but also that a fair distribution of supplies is made between the civil populations of the various areas having due regard to their actual or potential contribution to the war effort. It will therefore be essential, both for the conduct of the war and in order to promote a fair distribution of supplies between the inhabitants of areas with which the Administration is concerned and those of other areas, that demands upon supplies and shipping presented by the Administration should be coördinated with other demands through the use of the existing intergovernmental agencies concerned with the allocation of supplies and shipping.

2. It will be an essential part of the functions of the Administration to secure a fair distribution of goods which are in short supply and of shipping services to and among the various areas liberated or to be liberated. For this purpose the Administration must have full knowledge of all the relief and rehabilitation import requirements of such areas, whatever arrangements may be contemplated for procurement or finance. Therefore, member governments shall keep the Administration fully informed of their requirements and programs of intended purchases. The Director General may present to the intergovernmental allocating agencies such recommendations or objections as he may deem necessary to obtain a fair distribution to and among both liberated and to be liberated areas. The Director General will present before the intergovernmental allocating agencies the over-all requirements for relief and rehabilitation of all areas liberated and to be liberated in order to permit a global consideration of these needs with all other needs. He may also present the particular requirements of any country for which the assistance of the Administration has been requested. It is anticipated that the Director General and, where necessary, the Chairman of the Committee on Supplies, will be fully consulted by the intergovernmental allocating agencies when any matter touching the interests of the Administration is under discussion.

3. In order that the supplies allocated by the appropriate intergovernmental agency against requirements presented and supported by the Administration may be procured expeditiously and without duplication of effort, the Director General, after consultation, where necessary, with the appropriate intergovernmental agency, will make use wherever possible of the established national agencies concerned with the procurement, handling, storage, and transport of supplies. The member governments to which such national agencies are responsible would agree on their part to put the services of such agencies at the disposal of the Administration. Such additional responsibilities would form part of those already undertaken in prosecuting the war effort of the United Nations.

IV. Relationship of the Administration With the Military Command

1. Before an area is liberated, the Administration will, when requested by the military authorities,

(*a*) consult with them in the planning of supplies for the relief and rehabilitation of the area during the period of military control;
(*b*) arrange for the advance procurement of such supplies as may be agreed on to supplement supplies to be provided by the military authorities.

2. During the period when a liberated area is under military control, the Administration, so far as the Director General deems practicable, will, when requested by the military authorities,

(*a*) arrange for the procurement of supplies to supplement supplies being provided by the military authorities;
(*b*) furnish expert personnel and services, and advise on the conservation and utilization for relief purposes of stocks and productive resources;
(*c*) assist in the carrying out of policies with regard to the repatriation or return of displaced persons as formulated in paragraph II, 2, above;
(*d*) undertake other relief and rehabilitation activities;
(*e*) assume responsibility in whole or in part for such activities.

In undertaking any of these functions the Administration shall, so far as circumstances permit, seek the advice of the government or recognized national authority concerned.

3. It is recommended to the member governments that the Administration be kept informed so far as is practicable of the operations of the civil affairs branches of the military command and control authorities, in order that the Director General may make the necessary preparations for the provision of staff and facilities so that a smooth transition from the period of military control may be insured and the flow of supplies maintained.

4. It is recommended to member governments that the transition in each area from military to civilian relief and rehabilitation operations be consummated at the earliest date that military considerations permit.

RESOLUTION NO. 2

A RESOLUTION RELATING TO NON-DISCRIMINATION

Resolved

1. That, in any area where relief and rehabilitation operations are being conducted through the employment, in whole or in part, of the Administration's resources, relief and rehabilitation in all its aspects shall be distributed or dispensed fairly on the basis of the relative needs of the popula-

tion in the area, and without discrimination because of race, creed, or political belief.

2. That, in determining the relative needs of the population, there may be taken into account the diverse needs caused by discriminatory treatment by the enemy during its occupation of the area.

RESOLUTION NO. 3

A RESOLUTION RELATING TO ASSISTANCE FROM MEMBER GOVERNMENTS

Resolved

That the Council recommends that member governments take such steps as may be necessary and feasible to facilitate any operations of the Administration within areas under their control, assisting the Administration in obtaining such services, facilities, and personnel as may be required to carry on such operations, and arranging to the extent possible that the Administration's expenditures for services, facilities, supplies, equipment, and personnel be minimized so that its resources may be devoted directly to relief and rehabilitation.

RESOLUTION NO. 4

A RESOLUTION RELATING TO ADMINISTRATION PUBLICITY

Resolved

That the Council recommends that member governments, consistently with such measures as they consider necessary to regulate the dissemination of information while hostilities or other military necessities exist, afford the Administration opportunity to make public information with regard to its operations, and that they permit the use of special labels or other designations on supplies and equipment belonging to or furnished by the Administration.

RESOLUTION NO. 5

A RESOLUTION RELATING TO THE RELATIONS OF THE ADMINISTRATION WITH INTERGOVERNMENTAL AGENCIES OTHER THAN THOSE ESTABLISHED TO DEAL WITH SUPPLIES, SHIPPING, AND RELATED QUESTIONS

Resolved

1. That the Council reaffirms the principle of coöperation between the Administration and other intergovernmental agencies as set forth in the report of the Temporary Committee on Admission of Observers adopted by the Council on November 12, 1943.

2. That the Council invite representatives of the League of Nations Technical Organizations, the International Labor Organization, the Intergovernmental Committee on Refugees, and the United Nations Interim Commission on Food and Agriculture (or representatives from the Permanent Organization for Food and Agriculture now represented by the Interim Commission), to attend as observers and to participate in the meetings of the

Council, its committees, and subcommittees, and in the meetings of regional committees and technical standing committees, in accordance with appropriate provisions in the Permanent Rules of Procedure.

3. That the Director General avail himself of the organizations mentioned in paragraph 2 above as the nature of the work and other circumstances make appropriate.

4. That the Director General, in pursuance of the principle set forth in paragraph 1 above, coöperate to such a degree and to such extent as he may deem desirable in the interests of the Administration with all other intergovernmental agencies whose operations and specialized services may be of value to the Administration, including the sending of his representatives as observers to the meetings of other intergovernmental agencies, as well as those mentioned in paragraph 2 above.

RESOLUTION NO. 6

A RESOLUTION RELATING TO COLLABORATION WITH REGARD TO ECONOMIC MEASURES

Resolved

That the Council recommends that member governments consult with the Director General with a view to avoiding, so far as possible, the subjection of the funds, supplies, equipment, and services of the Administration to economic measures which might diminish the effectiveness of such activities or impose financial burdens on the Administration.

RESOLUTION NO. 18

A RESOLUTION FIXING THE COMPOSITION OF THE COMMITTEE OF THE COUNCIL FOR EUROPE

Whereas

In paragraph 5 of Article III of the Agreement there is established a standing Committee of the Council for Europe and,

Whereas

The Agreement further provides that the said Committee "shall consist of all the members of the Council, or their alternates, representing member governments of territories within the European area and such other members of the Council representing other governments directly concerned with the problems of relief and rehabilitation in the European area as shall be appointed by the Council"; and,

Whereas

The terms "Europe" and "European area" are not defined in the Agreement; it is therefore

Resolved

1. That for the purposes of the Committee of the Council for Europe, the terms "Europe" and "European area" shall be construed to include the en-

tire continent of Europe, the British Isles, Iceland, and all islands in the Mediterranean.

2. That the Committee of the Council for Europe shall consist of the members of the Council or their alternates representing Belgium, Czechoslovakia, the French Committee of National Liberation, Greece, Iceland, Luxembourg, the Netherlands, Norway, Poland, the Union of Soviet Socialist Republics, the United Kingdom, and Yugoslavia, being countries included within the European area, and in addition the members of the Council or their alternates representing Brazil, Canada, and the United States of America.

3. That the Central Committee is authorized to appoint additional members to the Committee in cases of emergency between sessions of the Council, such appointments to continue until the next session of the Council.

RESOLUTION NO. 19

A RESOLUTION FIXING THE COMPOSITION OF THE COMMITTEE OF THE COUNCIL FOR THE FAR EAST

Whereas

In paragraph 5 of Article III of the UNRRA Agreement there is established a "Committee of the Council for the Far East"; and,

Whereas

The Agreement further provides that the said Committee "shall consist of all the members of the Council, or their alternates, representing member governments of territories within the Far Eastern area and such other members of the Council representing other governments directly concerned with the problems of relief and rehabilitation in the Far Eastern area as shall be appointed by the Council"; and,

Whereas

The terms "Far East" and "Far Eastern area" are not defined in the Agreement; it is therefore

Resolved

1. That for the purposes of the Committee of the Council for the Far East the terms "Far East" and "Far Eastern area" shall be construed to include eastern continental Asia, the East Indies, Philippine Islands, Australia, New Zealand, and the islands of the eastern Indian and western Pacific Oceans.

2. That the Committee of the Council for the Far East shall consist of the members of the Council or their alternates, representing Australia, China, the French Committee of National Liberation, India, the Netherlands, New Zealand, the Philippine Commonwealth, the United Kingdom, and the United States of America; and

3. That the Central Committee is authorized to appoint additional members to the Committee in cases of emergency between sessions of the Council, such appointments to continue until the next session of the Council.

RESOLUTION NO. 20

A RESOLUTION RELATING TO THE FUNCTIONS OF THE COMMITTEES OF THE COUNCIL FOR EUROPE AND THE FAR EAST

Resolved

That the functions of the Committee of the Council for Europe and the Committee of the Council for the Far East shall be:

1. In the light of conditions prevailing in Europe and the Far East, and with the advice of such technical or special subcommittees as may be created, to recommend from time to time, as policies to be adopted by the Council, whatever basis or bases for over-all requirements the committees think appropriate for the whole or parts of their respective areas; and to advise the Director General with respect to the computation of over-all requirements for their respective areas in conformity with the bases and policies approved by the Council.

2. To advise the Director General with respect to the fair and equitable apportionment of relief and rehabilitation supplies available to areas within the European and Far Eastern regions respectively where the Administration may operate; and to assist him in securing the maximum production and interchange of any surplus supplies which can be made available within each region, by promoting appropriate national or intergovernmental action on the part of member governments.

3. To receive and discuss the periodic reports covering the programs and activities of the Administration in Europe and the Far East, respectively; and to advise the Director General on the organization of measures to assist displaced persons and the coördination of national action in regard to medical and other relief and rehabilitation problems common to each region; and

4. Generally to consider relief and rehabilitation policies in Europe and the Far East, respectively; to formulate recommendations on such polices,[1] and to discuss such recommendations with the Director General or his representative; and to transmit such recommendations to the Director General for distribution to the Council and the Central Committee.

RESOLUTION NO. 32

A RESOLUTION RELATING TO FACILITIES AND IMMUNITIES FOR THE ADMINISTRATION, ITS COUNCIL AND COMMITTEE MEMBERS AND ITS STAFF

Whereas

The Council is desirous of insuring to the Administration and its agents the independence necessary for the efficient performance of the duties entrusted to them, and of avoiding the imposition of financial burdens upon the funds contributed by member governments to the Administration; it is therefore

[1] So in original.

Resolved

I. That the Council recommends:

1. That the member governments accord to the Administration the facilities, privileges, immunities, and exemptions which they accord to each other, including

(*a*) Immunity from suit and legal process except with the consent of, or so far as is provided for in any contract entered into by or on behalf of, the Administration;

(*b*) Inviolability of premises occupied by and of the archives of the Administration;

(*c*) Exemptions from taxation, including customs duties;

(*d*) Exemptions from or facilities in respect of foreign exchange controls.

2. That member governments take any steps that they may consider necessary to enable the Administration to exercise within their jurisdiction the powers conferred on it by Article I, paragraph 1, of the Agreement.

3. That member governments accord to representatives of member governments on the Council and its committees and to the officials and employees of the Administration when engaged on the business of the Administration, the following privileges and immunities in their respective territories:

(*a*) immunity from legal process of any kind in respect of acts performed by them in their official capacity and falling within their functions as such;

(*b*) immunity from taxation on official salaries, allowances, or other emoluments as representatives, officials, or employees of the Administration;

(*c*) the same immunities from immigration restrictions, alien registration and military service obligations and the same facilities as regards exchange restrictions as are accorded to representatives, officials, and employees of similar rank of other member governments;

(*d*) any further privileges and immunities that the Director General may request as necessary to safeguard representatives, officials, or employees in the territories of any member government where they are engaged and particularly those engaged in field operations in the areas in which the Administration may be undertaking relief and rehabilitation.

Provided that each member government shall determine to what extent the above recommendations shall apply to its own nationals, and to non-nationals in permanent residence in its territories.

4. That the member governments make any necessary arrangements

with the Director General for the application of the foregoing recommendations.

II. That the Council requests the Director General

1. To initiate immediate negotiations with member governments to bring such arrangements into operation as rapidly as possible.

2. Wherever appropriate, to approach non-member governments with a view to their granting such of the above-mentioned facilities, privileges, immunities, and exemptions as may be desirable to facilitate the work of the Administration.

RESOLUTION NO. 33

A RESOLUTION RELATING TO IMMUNITIES AND PRIORITIES FOR TRANSIT GOODS

Resolved

That the Council recommends that each member government expedite to the extent possible supplies and equipment of the Administration in transit, and that it exempt such supplies and equipment of the Administration from adverse legal action or seizure.

RESOLUTION NO. 34

A RESOLUTION RELATING TO OFFICIAL CORRESPONDENCE OF THE ADMINISTRATION

Whereas

The Council recognizes the need for expedition, economy, and secrecy in the transmission of the official correspondence of the Administration; it is therefore

Resolved

I. That the Council recommends:

1. That the member governments accord to the official correspondence of the Administration

(*a*) the same treatment as is accorded by them to the official correspondence of other member governments, including:

(i) Priorities for telephone and telegraph communications, whether cable or radio, and for mail transmitted by pouch or by courier.

(ii) Government rebates for official telegrams.

(iii) Diplomatic status for couriers and pouches of the Administration.

(iv) Under appropriate safeguards, exemption from censorship of the official correspondence of the Administration.

(v) Appropriate arrangements for the use of codes and of cable addresses for the telegraphic correspondence of the Administration.

(*b*) Appropriate postal facilities, including such franking privileges or arrangements for the use of specially printed or overprinted stamps as may be possible.

2. That the member governments make any necessary arrangements with the Director General for the application of the foregoing recommendations.

II. That the Council requests the Director General:

1. To initiate immediate negotiations with member governments to bring such arrangements into operation as rapidly as possible.

2. Wherever appropriate, to approach non-member governments with a view to their granting such of the above-mentioned facilities, privileges, immunities, and exemptions as may be desirable to facilitate the work of the Administration.

RESOLUTION NO. 35

A RESOLUTION RELATING TO COMMUNICATIONS WITH NEUTRAL GOVERNMENTS

Resolved

That the Council recommends that member governments extend to the Director General technical facilities for communicating with governments neutral in the present conflict.

RESOLUTION NO. 36

A RESOLUTION RELATING TO TRAVEL FACILITIES FOR THE STAFF OF THE ADMINISTRATION

Whereas

The Council has in mind the importance of securing the expeditious and unhindered travel of officials and employees of the Administration necessary to permit the prompt fulfillment by the Administration of the urgent tasks entrusted to it; it is therefore

Resolved

I. That the Council recommends:

1. That the Director General issue to officials and employees of the Administration for use when traveling on official business a document identifying the official or employee and requesting in the name of the Administration that all appropriate facilities be granted to the bearer.

2. That all member governments give full recognition to such documents and instruct their diplomatic, consular, customs, and immigration services and any other services which may be concerned to recognize such documents as entitling the bearer to all appropriate facilities.

3. That in respect to passports and visas the member governments

accord to the officials and employees of the Administration the same treatment as is accorded to the officials and employees of comparable rank of their own or other governments.

4. That all member governments take the necessary steps to grant all appropriate and possible priorities for the travel of the officials of the Administration on official business and government rebates for such travel.

5. That the member governments make any necessary arrangements with the Director General for the application of the foregoing recommendations.

II. That the Council requests the Director General:

1. To initiate immediate negotiations with member governments to bring such arrangements into operation as rapidly as possible.

2. Wherever appropriate, to approach non-member governments with a view to their granting such of the above-mentioned facilities, privileges, immunities, and exemptions as may be desirable to facilitate the work of the Administration.

RESOLUTION NO. 37

A RESOLUTION RELATING TO PERSONNEL POLICIES

Whereas

The Council desires to promote the concept of a truly international civil service; and,

Whereas

It recognizes that the success of the Administration will in large part depend upon the vision, competence, integrity, and loyalty of the men and women who will become its administrative officers, and comprise its technical staff; and that the vesting, by the Agreement, of full executive authority and responsibility in the Director General, requires that he act with the greatest possible freedom in the selection of personnel and the establishment of personnel standards; it is therefore

Resolved

1. That the staff of the Administration should be of an international character, selected upon the basis of individual competence, character, and integrity, without discrimination on the grounds of sex, race, nationality, or creed, and recruited upon as wide a geographic basis as is possible, compatible with efficient administration; and that salary standards be established at a sufficiently high level to make it possible for the Administration to secure the employment of persons possessing the highest qualifications within their own particular field of endeavor; and that due consideration should be given to the special problems which will arise because of the varying salary standards that will prevail in the different countries in which the Administration will operate.

2. That the Council recommends:

(*a*) That all member governments endeavor to make available to the Administration such persons in their own civil service as the Director General may invite to join the staff of the Administration; and to take proper steps to insure that the established rights and status of such persons shall be in no way adversely affected by their temporary employment by the Administration.

(*b*) That international agencies be urged to adopt the same policy with respect to such of their employees as may be invited to join the staff of the Administration.

RESOLUTION NO. 38

A RESOLUTION RELATING TO THE ADMINISTRATIVE BUDGET AND THE ALLOCATION OF ADMINISTRATIVE EXPENSES

Resolved

1. That the annual budget covering the necessary administrative expenses of the Administration for the calendar year 1944 and the unelapsed part of the year 1943 submitted by the Director General in the amount of $10,000,000 is hereby approved.

2. That the total amount of $10,000,000 approved in the preceding paragraph is allocated to the member governments in the following proportions:

	Percentage		*Percentage*
Australia	1.50	India	4.00
Belgium	1.00	Iran	.10
Bolivia	.10	Iraq	.10
Brazil	1.50	Liberia	.05
Canada	3.00	Luxembourg	.05
Chile	.20	Mexico	.70
China	5.00	Netherlands	1.50
Colombia	.30	New Zealand	.30
Costa Rica	.05	Nicaragua	.05
Cuba	.20	Norway	.30
Czechoslovakia	1.00	Panama	.05
Dominican Republic	.05	Paraguay	.05
Ecuador	.05	Peru	.25
Egypt	.70	Philippines	.05
El Salvador	.05	Poland	1.00
Ethiopia	.05	Union of South Africa	1.00
French Committee of National Liberation	4.00	U.S.S.R.	15.00
Greece	.50	United Kingdom	15.00
Guatemala	.05	U.S.A.	40.00
Haiti	.05	Uruguay	.20
Honduras	.05	Venezuela	.10
Iceland	.05	Yugoslavia	.70
			100.00

RESOLUTION NO. 39

A RESOLUTION RELATING TO THE SALARY OF THE DIRECTOR GENERAL

Resolved

That the salary of the Director General be the salary of the members of the Cabinet of the President of the United States of America.

RESOLUTION NO. 40

A RESOLUTION RELATING TO THE RULES OF PROCEDURE OF THE COUNCIL AND THE RULES OF STANDING COMMITTEES OF THE COUNCIL

Resolved

That the Rules of Procedure of the Council attached hereto, together with Annex I thereto, Rules of Standing Committees of the Council, shall be the rules of procedure of the Council and the rules of Standing Committees of the Council.[2]

RESOLUTION NO. 41

A RESOLUTION RELATING TO REGULATIONS WITH RESPECT TO EXPENDITURES AND RECEIPTS OF THE ADMINISTRATION

Resolved

That the Council adopts the regulations attached hereto which shall be considered as Annex II to the Rules of Procedure of the Council.[3]

RULES OF PROCEDURE OF THE COUNCIL

Article I

Sessions of the Council

1. In accordance with Article III, section 2, of the Agreement, the Council shall be convened in regular session by the Central Committee not less than twice a year. It may be convened in special session whenever the Central Committee shall deem necessary, and shall be so convened within thirty days after the request therefor by one-third of the members of the Council. Such request shall be communicated to the Director General who shall transmit it forthwith to the Central Committee.

2. The Director General, after consultation with the Central Committee, shall fix the time and place of the first meeting of each session of the Council and shall notify the member governments [4] not less than sixty days in advance of a regular session and not less than three weeks in advance of a special session.

[2] Rules of Procedure of the Council not reproduced here.—ED.

[3] Annex II the same.

[4] Whenever the term "member government" is used in these Rules of Procedure and any Annex thereto, it shall be construed to mean a member of the Administration whether a government or an authority.

3. As a general rule, the plenary meetings of the Council shall be public, but the Council may decide that any meeting shall be held in private.

4. All decisions of the Council which may have been taken at a private meeting shall be announced at an early public meeting of the Council.

Article II

Officers of the Council

1. At the opening of each session of the Council, the Director General shall preside until the Council has elected a Chairman for the session.

2. The Council shall, after consideration of the report of the Committee on Nominations, elect a Chairman and three Vice Chairmen of the Council. The Chairman and Vice Chairmen shall hold office until the close of the session at which they are elected. In the event of the death, resignation, or other inability of the Chairman to complete his term, a new Chairman shall be elected for the unexpired term.

3. In addition to the other powers conferred upon the Chairman by these Rules of Procedure, he shall declare the opening and closing of each meeting of the Council. He shall direct the discussions of the Council, insure observance of these Rules of Procedure, accord the right to address the Council, put questions to the Council, and announce the results of all votes.

4. In the absence of the Chairman during a meeting, or any part thereof, one of the Vice Chairmen, taken in rotation according to the alphabetical order of the governments which they represent, shall preside. A Vice Chairman acting as Chairman shall have the same powers and duties as the Chairman.

5. The Chairman, or a Vice Chairman acting as Chairman, shall not vote but may appoint an alternate to act as the representative of his government on the Council.

Article III

The Director General

1. The Director General or his representative may attend and address any meeting of the Council and of its committees and subcommittees and may participate in the discussions, but may not vote.

Article IV

The Secretariat

1. In accordance with Article IV, section 4, of the Agreement, the Director General, or upon his authorization the Deputy Directors General, shall supply such secretariat and other staff and facilities as shall be required by the Council and its committees, including the regional committees and subcommittees.

2. The Director General shall be responsible for the organization and direction of the secretariat of the Council.

3. It shall be the duty of the secretariat to receive, translate, and distribute documents, reports, and resolutions of the Council and its committees; to prepare the records of the proceedings of the Council and its committees; to distribute reports and recommendations of committees of the Council to the Council and the Central Committee; and to perform such other work as the Council shall require.

4. The secretariat shall distribute to member governments proposals and other documents relating to the agenda of any session of the Council as far as possible in advance of the opening of such session.

Article V

The Central Committee

1. Meetings of the Central Committee may be convened by the Director General whenever he deems advisable and shall be convened by him within ten days after the request therefor by any member of the Central Committee.

2. The time and place of the meetings of the Central Committee shall be fixed by the Director General after consultation with the members of the Central Committee.

3. The meetings of the Central Committee shall be held in private unless it shall, by unanimous vote, decide that any meeting shall be public.

4. In accordance with Article III, section 3, of the Agreement, the Central Committee shall invite the participation of the representative of any member government at those of its meetings at which action of special interest to such government is discussed. It shall invite the participation of the representative serving as Chairman of the Committee on Supplies of the Council at those of its meetings at which policies affecting the provision of supplies are discussed.

5. The minutes of each meeting of the Central Committee shall be sent as soon as possible to members of the Central Committee and to the representatives of those member governments participating in such meeting of the Central Committee, who shall, within forty-eight hours, inform the Director General of any corrections which they may desire to have made in the record of their own remarks. As corrected, the minutes shall be filed with the Director General and communicated promptly to each member government of the Administration.

6. At each session of the Council, the Director General shall render a full report on the work of the Central Committee since the preceding session of the Council.

Article VI

Committee Organization of the Council

1. At the opening of each session, the Council shall elect a Committee on Nominations consisting of eleven members of the Council. This Committee

shall submit to the Council nominations for the offices of Chairman and Vice Chairmen of the Council, for the four members of the General Committee to be elected by the Council, and for appointments to each standing or other committee of the Council for which new appointments may be required.[5]

2. At the opening of each session, the Council shall establish a General Committee consisting of the Chairman and Vice Chairmen of the Council, the members of the Central Committee, and four other members elected by the Council. The General Committee shall, subject to the concurrence of the Council and in consultation with the Director General, determine the order of business of the Council, set the date of adjournment of the session, fix the time and place of each meeting during the session, decide what matters are to be considered at each meeting, pass upon the provisional agenda in accordance with Article VIII of these Rules of Procedure, coördinate the work of all committees of the Council during the session, and otherwise facilitate the orderly dispatch of the business of the Council and its committees. The Chairman of the Council shall convene and preside at the meetings of the General Committee.

3. Subject to the provisions of Article III of the Agreement, the Council shall, after consideration of the report of the Committee on Nominations, designate the member governments to be represented on the Committee on Supplies, the Committee of the Council for Europe, the Committee of the Council for the Far East, and such other standing committees, other than standing technical committees, as the Council may establish.

4. In accordance with Article III of the Agreement, the Council shall, after consideration of the report of the Committee on Nominations, appoint the members of all standing technical committees which the Council may from time to time establish.

5. The rules of procedure applicable to all standing committees of the Council are set forth in Annex I to these Rules of Procedure.

6. The Council may appoint, or in particular cases authorize the appointment of, such temporary or special committees as may be required for advice or investigation, or for report on specific matters. Unless the Council decides otherwise, each temporary or special committee shall elect its own chairman and, if deemed necessary, a vice chairman and a rapporteur. The term of these committees shall end when their respective assignments have been completed or when the Council so decides.

7. Even when nominations are submitted to the Council by any committee pursuant to these Rules of Procedure and any Annex thereto, the members of the Council shall, within the limitations imposed by Article III of the Agreement, retain the right to propose and to vote for persons other than those nominated by such committee.

[5] Whenever the term "standing committee" appears in these Rules of Procedure, it shall be construed to include the Committee on Supplies of the Council.

Article VII

Attendance of Observers

1. The Council and the Central Committee may invite observers, or may invite public international organizations, non-member governments or authorities, relief and welfare agencies or others to send observers, to attend all or any of their meetings or parts thereof, or to participate in such meetings or parts thereof, without vote, under such conditions as the Council or the Central Committee, respectively, shall determine. All such invitations shall be transmitted by the Director General.

Article VIII

Agenda

1. The provisional agenda of each session of the Council shall be prepared by the Director General, and shall include
   (*a*) all items proposed by the Council at any previous session;
   (*b*) all items proposed by the Central Committee;
   (*c*) all items proposed by any member of the Council and transmitted to the Director General at least ten days in advance of the session; and
   (*d*) any item which the Director General desires to put before the Council.
2. The provisional agenda shall be communicated to member governments as far as possible in advance of and not less than three weeks before the opening day of the session. Items transmitted to the Director General too late for inclusion will be at once communicated to member governments.
3. The provisional agenda so communicated shall be passed upon by the General Committee and submitted to the Council for approval as soon as convenient after the opening of any session.
4. The Council may later revise or add to the agenda.

Article IX

Procedure for the Conduct of Council Business

1. Every proposal which may be introduced into the Council by a member and which involves formal action by the Council on any item of the agenda shall forthwith be referred by the Chairman of the Council to the appropriate committee or committees. No action or vote shall be taken by the Council on any such proposal until a report thereon by such committee or committees has been presented and circulated to the members of the Council, unless the Council shall, by two-thirds vote, determine otherwise. Such reports shall, so far as practicable, be circulated at least twenty-four hours prior to the meeting at which the Council takes action or votes thereon.

2. The chairman or rapporteur of a committee shall be accorded preference for the purpose of explaining or defending the report of the committee.

3. During the discussion of any question, any member may move the previous question or the adjournment. Any such motion shall have priority in the debate.

4. A member may at any time move the closure of the debate. If application is made to speak against the closure, it may be accorded to not more than two speakers. If the Council decides in favor of the closure, the Chairman shall declare the closure of the debate.

Article X

Voting

1. A majority of the members of the Council shall constitute a quorum for any formal action by the Council, except that for any proposal to amend the Agreement three-fourths of the members shall constitute a quorum.

2. Each member government represented on the Council or on any of its committees or subcommittees shall have only one vote.

3. When any representative is unable to attend one or more meetings of the Council, his place may be taken by an alternate. The name of such alternate shall be communicated to the Chairman of the Council.

4. Except as otherwise provided by the Agreement or by these Rules of Procedure, all decisions of the Council shall require an affirmative majority vote of the members present.

5. Voting shall be by show of hands except as hereinafter provided.

6. In case of doubt as to the result of any vote by show of hands, the Chairman shall cause a record vote to be taken.

7. A record vote shall be taken in all cases where a special majority is required by the Agreement.

8. A record vote shall also be taken on any question if requested in writing by not less than five members of the Council and handed to the Chairman in advance of the vote or immediately after a show of hands.

9. Record votes shall be taken by calling upon members in the alphabetical order of the governments which they represent.

10. The vote of each member participating in any record vote shall be inserted in the verbatim report of the meeting.

11. On decisions relating to individuals, a secret ballot shall be taken whenever requested in writing by at least five members of the Council.

Article XI

Languages of the Council

1. English shall be the official language of the Council and its committees.

2. Upon the request of any member of the Council that the final recom-

mendations and resolutions of the Council and its committees shall be rendered both in English and in his own language, it shall be so provided.

Article XII

Records of Proceedings

1. A verbatim report of all plenary meetings held during each session of the Council shall be prepared by the secretariat and filed with the Director General. Such report shall be made available to any member government upon request. It shall not otherwise be distributed or published unless the Council shall decide to the contrary.

2. The secretariat shall prepare minutes of each session of the Council which shall be printed and circulated to member governments and which may be made public. The minutes of all private meetings shall be printed separately, distributed to member governments, and kept confidential.

3. The texts of all resolutions and formal decisions adopted at each session of the Council shall be transmitted by the Director General to each member government as soon as practicable after the adjournment of the session.

Article XIII

Administrative Expenditures and Receipts

1. Regulations with respect to the administrative expenditures and receipts of the Administration are set forth in Annex II of these Rules of Procedure.

Article XIV

Suspension and Amendment of Rules of Procedure of the Council

1. Any of the foregoing Rules of Procedure may be suspended by a two-thirds majority of the members of the Council present at any meeting.

2. Amendments thereto may be adopted by a simple majority of the members present at any meeting subject to the proposal having first been reported upon by a committee of the Council.

Article XV

Transitory Provision

1. The adoption of the foregoing Rules of Procedure shall constitute a validation of the appointment of all standing committees of the Council made at its first session.

ANNEX I

RULES OF STANDING COMMITTEES OF THE COUNCIL [6]

Article I

Appointment and Tenure

1. Subject to the provisions of Article III of the Agreement, the Council

[6] Including the Committee on Supplies of the Council.

shall, after consideration of the report of the Committee on Nominations, appoint the members of the standing committees of the Council.

2. Such appointments, in the case of the Committee on Supplies, the standing regional committees, and such other standing committees other than standing technical committees, as the Council shall establish, shall be made by designating the member governments whose representatives or alternates shall serve as members of such committees.

3. In the case of standing technical committees, such appointments shall be made by naming members of the Council or alternates nominated by such members because of special competence in their respective fields of work.

4. Except in the case of sppointments made by the Central Committee in accordance with section 5 below, the appointment of members of the Committee on Supplies, the standing regional committees, and such other standing committees other than standing technical committees as the Council shall establish, shall continue until changes or replacements therein are made by the Council. The appointment of members to the standing technical committees of the Council shall be made at each regular session of the Council. Until such appointments are made, the membership of such committees shall continue. Members of all standing committees shall be eligible for reappointment.

5. In accordance with Article III of the Agreement, the Central Committee, if previously authorized by the Council, may make emergency appointments to any standing committee between sessions of the Council. Such appointments shall continue until the next regular or special session of the Council.

6. Members of standing committees may be accompanied to the meetings thereof by advisers and assistants, who may participate in the discussions under such conditions as the committee shall prescribe but shall not be entitled to vote.

7. The travel and other expenses of members of the standing committees of the Council, and of their advisers and assistants, shall be borne by the member governments which have nominated them.

Article II

Meetings of Standing Committees of the Council

1. The Director General shall fix the time and place of the first meeting of each standing committee and he or his representative shall preside at the meeting until the committee has elected its chairman.

2. Subsequent meetings of each standing committee shall be convened by the chairman at such time and place as may be decided upon by the committee, provided that meetings of the Committee on Supplies, the Committee on Financial Control, and all technical standing committees of the Council shall, in addition, be held so far as possible at the same time and place as each regular session of the Council. The chairman shall convene meetings

of a standing committee whenever requested by at least one-third of its members.

3. The meetings of each standing committee shall be private unless the committee shall decide by a two-thirds vote of the members present that any meeting shall be public. Any standing committee may invite observers, or may invite other public international organizations, non-member governments or authorities, relief and welfare agencies or others to send observers, to attend all or any of its meetings or parts thereof, or to participate in such meetings or parts thereof, without vote, under such conditionsas the committee shall determine.

Article III

Officers of Standing Committees of the Council

1. At its first meeting each standing committee shall elect a chairman, a first vice chairman, a second vice chairman and, if deemed necessary, one or more rapporteurs. The chairman and vice chairmen shall hold office until a new election takes place.

2. A new election of chairman and vice chairmen of any standing committee shall be held if, after a period of not less than a year from their election, the committee shall so decide. In this event, the election shall be held at the next meeting of the committee. The officers of all standing committees shall be eligible for reelection.

3. Upon the death, resignation, or inability to serve of any officer of any standing committee, an election to fill the vacancy thus created shall be held as soon as practicable.

4. Upon the death, resignation, or inability to serve of the chairman of any standing committee, the first vice chairman, or if he is not available the second vice chairman, shall serve as chairman *ad interim* until a new chairman is elected.

5. The chairman, or a vice chairman acting as chairman, shall have the same powers and duties, in respect of committee meetings, as are provided for the Chairman of the Council in Article II, sections 3 and 5, of its Rules of Procedure.

Article IV

Agenda

1. The provisional agenda for each meeting of each standing committee of the Council shall be prepared by the Director General or a Deputy Director General in consultation with the chairman of the committee, and shall include:

(*a*) all items proposed by the committee at any previous meeting;
(*b*) all items proposed by the Council, the Central Committee, or another standing committee of the Council;
(*c*) all items proposed by any member of the committee and trans-

mitted to the Director General at least five days in advance of the meeting; and

(*d*) any item which the Director General desires to put before the committee.

2. The provisional agenda shall be communicated to the members of the committee as far as possible in advance of the meeting. Items transmitted to the Director General too late for inclusion in the provisional agenda shall be at once communicated to the members of the committee.

3. The committee may revise or add to the agenda.

Article V

Procedure for the Conduct of Committee Business

1. A majority of the members of each standing committee shall constitute a quorum for any formal action by such committee.

2. Unless otherwise provided by these rules, all decisions of a standing committee shall require an affirmative majority vote of the members present at the meeting.

3. Any standing committee may establish such *ad hoc* subcommittees as it considers necessary for the facilitation of its work. The chairman of the committee shall, with the approval of the committee, appoint the chairman and members of each such subcommittee, which shall report only to the committee which established it. In case of need, the chairman may proceed to appoint such *ad hoc* subcommittees with the authorization of a majority of the members, subject to subsequent formal approval by the committee.

4. Any request from a regional committee to any technical committee for the establishment of a technical subcommittee to advise the regional committee shall be transmitted to the Director General, who shall forthwith inform the chairman and members of the technical committee concerned. The chairman of the technical committee shall, with the approval of the committee, appoint the chairman and members of each such subcommittee. In case of need, the chairman may proceed to appoint such technical subcommittees with the authorization of a majority of the members, subject to subsequent formal approval by the committee.

5. Any subcommittee so appointed shall report to the regional committee concerned through the appropriate representative of the Director General, who will transmit copies of the report to the Director General for his information. A copy of the report shall be distributed to the technical committee and to any other standing committee concerned.

6. Each standing committee may adopt such other rules governing the conduct of its business and the business of its subcommittees as are not inconsistent with the Agreement, the Permanent Rules of Procedure of the Council, and any Annex thereto.

Article VI

Records and Reports of Standing Committees

1. All reports and recommendations of standing committees, whether made on their initiative or at the request of the Council, the Central Committee, the Director General, or any member government, shall be transmitted to the Director General for distribution to the Council and the Central Committee.

2. The secretary of each standing committee shall prepare minutes of each meeting which shall contain a record of the conclusions reached by the committee. When approved by the chairman, the minutes shall be filed with the Director General, who shall distribute a copy thereof to each member government of the Administration.

3. A verbatim report of the meetings of any standing committee shall be kept if the committee so decides. Such report shall be filed with the Director General and made available to any member government of the Administration upon specific request, but shall not otherwise be distributed or published.

Article VII

Amendment of Annex I

1. The rules contained in this Annex shall apply to all standing committees of the Council but not to the Central Committee.

2. The rules contained in this Annex may be amended by the Council in the same manner as provided for the amendment of the Rules of Procedure of the Council.

Annex II

Regulations with respect to expenditures and receipts of the Administration

1. The fiscal year of the Administration shall be the calendar year.

2. The Director General shall submit to the Council at its regular session next preceding the commencement of the calendar year an annual budget covering the estimated administrative expenses of the Administration for that year. The budget for the calendar year 1944 shall include estimated administrative expenditures for the year 1944 and for the unelapsed part of the year 1943. The budget shall be accompanied by a statement of the estimated receipts, a statement of the actual expenditures through the end of the quarter preceding the submission of the budget, and by an explanation and justification of the amount budgeted.

3. The Director General may submit to any session of the Council supplementary budgets or a budget amending a previously approved budget.

4. The proposed budget or a supplementary budget shall be referred for consideration to the appropriate committee of the Council for report, comment, and recommendation for action by the Council.

5. The approval of the budget or a supplementary budget by the Council shall make available to the Director General from the general resources of the Administration, for obligations and expenditures for administrative purposes during the year to which the budget relates, the amount specified therein but not exceeding such amount.

6. Pending the consideration which may be required for the final determination of a method of allocation, the amount of administrative expenses of the Administration approved by the Council in the annual budget or in a supplementary budget shall be allocated for the year 1944 to member governments in the proportions shown in the resolution adopted by the Council relating to the Administrative Budget and the allocation of administrative expenses. The consideration of the question whether the proportions shown in the Appendix require revision in order to provide a method of allocation for subsequent years appropriate to the Administration shall be referred to an appropriate committee of the Council upon its establishment. The Council recognizes that the criterion of allocations hitherto adopted by other bodies is not suitable to the Administration.

The allocation to member governments for the succeeding year shall be adjusted for any differences between the provisional allocations and those finally determined.

Upon the admission of a government as a member, its share of administrative expense shall be fixed by the Council upon recommendation by the appropriate committee of the Council.

7. Each member government undertakes, subject to the requirements of its constitutional procedure, to contribute to the Administration promptly its share of the administrative expenses so determined. A member government may treat its share of the administrative expense as included in its general contribution for participation in the work of the Administration.

8. The Director General shall prescribe the procedure for setting up and maintaining accounts showing administrative and operating expenditures and the receipts from each government of its contribution, including its share of the administrative expense.

9. The Director General shall make provision for the bonding of employees to insure the Administration against loss by their acts.

10. The Director General shall designate the depositories of any funds held in the name of the Administration.

11. The Director General shall, in consultation with the appropriate member government, select such fiscal agents for the Administration as he may require.

12. The Director General shall submit to the appropriate committee of the Council, quarterly reports of operating and administrative expenditures and receipts, and copies thereof furnished to each member of the Council.

13. Upon nomination by the appropriate committee of the Council the Council shall appoint a person or firm to make annually an independent

audit of the accounts and records of the Administration, and a copy of each audit shall be furnished to each member of the Council.

Reports of Committee I

Report on Organization and Administration

The Committee on Organization and Administration, having met and having considered the reports of its four subcommittees, recommends the adoption by the Council of the resolutions appended hereto on the following subjects:

I. Regional Committees of the Council

1. Composition of the Committee of the Council for Europe (Appendix I)
2. Composition of the Committee of the Council for the Far East (Appendix II)
3. Functions of the Committees of the Council for Europe and the Far East (Appendix III)

II. Standing Technical Committees of the Council

1. Creation and Composition of Standing Technical Committees (Appendix IV)

In the resolution appended hereto the Committee points out that as each member government may name a representative on each of the technical committees it is likely that membership on these committees will be large and may not always be confined to technicians. The Committee therefore deems it important to emphasize to the Council the desirability of firmly establishing the principle that the standing technical committees and subcommittees should be relatively small groups of experts, selected solely for their special competence and familiarity with the questions with which they are to deal.

2. Functions of the Committee on Agriculture (Appendix V)
3. Functions of the Committee on Displaced Persons (Appendix VI)
4. Functions of the Committee on Health (Appendix VII)
5. Functions of the Committee on Industrial Rehabilitation (Appendix VIII)
6. Functions of the Committee on Welfare (Appendix IX)

III. Facilities and Immunities for the Administration, Its Council and Committee Members and Its Staff

1. Facilities and Immunities for the Administration, its Council and Committee Members and its Staff (Appendix X)
2. Official Correspondence of the Administration (Appendix XI)
3. Travel Facilities for the Staff of the Administration (Appendix XII)

In section II of each of the last three resolutions, the Council requests the Director General to initiate immediately negotiations with member

governments to bring the arrangements mentioned in the resolution into operation as rapidly as possible. The Committee hopes that the member governments will carry on these negotiations on their side speedily and that no member government will withhold these immunities and facilities pending favorable action by other governments. It is important, in the opinion of the Committee, that the member governments act in these matters as quickly as their executive and legislative procedures permit.

IV. Rules of Procedure of the Council and Its Standing Committees

The Committee recommends to the Council that it adopt the resolution which follows, bringing into force the Rules of Procedure of the Council and Annex I thereto, being the Rules of Standing Committees of the Council.

With reference to Article XI of the proposed Rules of Procedure of the Council, the representative of the French Committee of National Liberation stated that he accepted in principle the use of English as the official language of the Council and its committees in view of the exclusively economic and technical character of the problems with which the Council has to deal, it being clearly understood, however, that he did not renounce in any way the right to claim for French its traditional role as the official language in the discussion and formulation of international documents of a diplomatic character. The representatives of Belgium, Luxembourg, and the Netherlands associated themselves with this statement of the representative of the French Committee of National Liberation.

The Committee points out that in accordance with Article XI, section 2, of the Temporary Rules of Procedure of the Council, the attached rules, which are designed to be permanent will, as soon as adopted by the Council, replace temporary rules.

A Resolution Relating to the Rules of Procedure of the Council and the Rules of Standing Committees of the Council

Resolved

That the Rules of Procedure of the Council attached hereto (Appendix XIII),[7] together with Annex I thereto, Rules of Standing Committees of the Council, shall be the rules of procedure of the Council and the rules of standing committees of the Council.

V. Personnel Policies of the Administration

With regard to personnel policies of the Administration the Committee, after examining the subject, has arrived at the following conclusions and recommendations:

1. The Council's function with respect to the problem of personnel is to formulate a broad general policy which will result in the employment of a

[7] Not reproduced here—ED.

staff of highly competent officers and employees who are truly international civil servants. It is recognized that the executive authority and responsibility are vested, under the Agreement, in the Director General. Consequently, it is necessary that he act with the greatest possible liberty in personnel matters so that he may speedily establish an efficient and adequate administrative force, composed of persons who are selected on the basis of their individual competence, integrity, and technical skill.

2. In order to attain a staff of truly international character it is recommended that recruitment should be upon as wide a geographic basis as possible, compatible with effective and efficient administration. It was agreed that it would be a wise policy for the Director General, in recruiting employees, to ascertain in advance if any condition or circumstance existed with respect to a candidate which might minimize the utility of such candidate to the Administration. It was further agreed, however, that the Director General must have the widest possible liberty in determining the relationship between the Administration and member governments in the recruitment of their nationals.

3. The Committee recommends that member governments assist the Director General in securing a properly qualified staff by making available to the Administration such persons in their own civil service as the Director General may invite to join the staff of the Administration. In such cases, proper steps should be taken by the member government to safeguard such persons from any loss in established status or rights by reasons of their temporary transfer to the service of the Administration. It was felt that the adoption of a similar policy by international agencies would be of great aid to the Director General and promote the development of common policies and a stronger international civil service.

4. It was recognized that the wholly temporary character of the Administration presents a very special personnel problem. Salary standards must be established at a sufficiently high level to make it possible for the Administration to secure the services of persons possessing the highest degree of competence in their respective fields of work. On the other hand, it was felt that the most careful scrutiny must be given by the Director General to the special problem which will arise because of the varying salary standards prevailing in the different parts of the world in which the Administration will operate; and that every precaution must be exercised by him to avoid inequities and eliminate friction because of these varying standards.

5. Recognizing that the scope and complexity of the work which the Administration is undertaking will require the services of persons possessing a wide variety of skills and technical knowledge, your subcommittee feels that it may, in some instances, be essential for the Administration to provide special training for its personnel. It was agreed that the fullest utilization should be made by the Administration of the men and women now serving in the armed forces of the United Nations, and who, at the close of the war,

will constitute a vast reservoir of manpower capable of making an extremely valuable contribution to the work of the Administration.

In order to make effective these conclusions, the Committee recommends the adoption by the Council of the following resolution:

A Resolution Relating to Personnel Policies

Whereas, the Council desires to promote the concept of a truly international civil service; and,

Whereas, it recognizes that the success of the Administration will in large part depend upon the vision, competence, integrity, and loyalty of the men and women who will become its administrative officers, and comprise its technical staff; and that the vesting, by the Agreement, of full executive authority and responsibility in the Director General, requires that he act with the greatest possible freedom in the selection of personnel and the establishment of personnel standards; it is therefore

Resolved

1. That the staff of the Administration should be of an international character, selected upon the basis of individual competence, character, and integrity, without discrimination on the grounds of sex, race, nationality, or creed, and recruited upon as wide a geographic basis as is possible, compatible with efficient administration; and that salary standards be established at a sufficiently high level to make it possible for the Administration to secure the employment of persons possessing the highest qualifications within their own particular field of endeavor; and that due consideration should be given to the special problems which will arise because of the varying salary standards that will prevail in the different countries in which the Administration will operate.

2. That the Council recommends

(a) That all member governments endeavor to make available to the Administration such persons in their own civil service as the Director General may invite to join the staff of the Administration; and to take proper steps to insure that the established rights and status of such persons shall be in no way adversely affected by their temporary employment by the Administration.

(b) That international agencies be urged to adopt the same policy with respect to such of their employees as may be invited to join the staff of the Administration.

VI. Regulations With Respect to Expenditures and Receipts of the Administration, Administrative Budget, and Allocation of Administrative Expenses

1. Regulations With Respect to Expenditures and Receipts of the Administration

The Committee recommends the adoption of the following resolution concerning the attached regulations with respect to expenditures and receipts of the Administration (Appendix XIV). Regulations in the financial field

are also included in the Financial Plan approved by Committee III. It is recommended that the report of that committee be studied and coordinated as far as necessary with the report of this Committee.

A Resolution Relating to Regulations With Respect to Expenditures and Receipts of the Administration

Resolved

That the Council adopts the regulations attached hereto which shall be considered as Annex II to the Rules of Procedure of the Council (Appendix XIII).[8]

2. Administrative Budget and Allocation of Administrative Expenses

The Committee, having considered the estimate of administrative expenses for the year 1944 and for the unelapsed part of the year 1943, submitted by the Director General as required by Article VI of the Agreement (Appendix XV), recommends the adoption by the Council of the resolution set forth below.

The Committee believes that it is essential for the purposes of Article VI of the Agreement and of the efficient operation of the Administration that a method of allocating administrative expenses among all member governments should be agreed by the present Council. In the time available, however, it did not appear possible to the Committee to suggest a schedule of allocations that could be confidently taken as finally the most appropriate. Consequently, the Committee proposes that the allocation to be made at this session of the Council, as set forth in the following resolution, should be regarded as provisional, in that it should be reviewed by the appropriate committee of the Council before a final determination is made by the Council for future years. In framing this schedule the Committee has sought guidance from existing schedules of allocations used by other international bodies. It has recognized, however, that it would not be appropriate for the Administration to adopt the principle which obtains on many such bodies of limiting the maximum allocation so that no state pays more than a comparatively small percentage of the total. It has further had in mind the desirability of a clear and simple schedule, and it has paid regard to the fact that the main object of the Administration is the provision of relief supplies and services, and that it would be undesirable to adopt a schedule of administrative expenses which would allocate an unduly large proportion of any government's general contribution to administrative expenses. At the same time the Committee has been anxious to meet the expressed desire of the governments of liberated areas to contribute substantially to the administrative expenses. In accordance with the regulations with respect to expenditures and receipts of the Administration, a member government may treat its share of the administrative expenses as included in its general contribution for participation in the work of the Administration.

[8] Not reproduced.—Ed.

A Resolution Relating to the Administrative Budget and the Allocation of Administrative Expenses

1. That the annual budget covering the necessary administrative expenses of the Administration for the calendar year 1944 and the unelapsed part of the year 1943 submitted by the Director General in the amount of $10,000,000 is hereby approved.

2. That the total amount of $10,000,000 approved in the preceding paragraph is allocated to the member governments in the following proportions:

	Percentage		*Percentage*
Australia	1.50	India	4.00
Belgium	1.00	Iran	.10
Bolivia	.10	Iraq	.10
Brazil	1.50	Liberia	.05
Canada	3.00	Luxembourg	.05
Chile	.20	Mexico	.70
China	5.00	Netherlands	1.50
Colombia	.30	New Zealand	.30
Costa Rica	.05	Nicaragua	.05
Cuba	.20	Norway	.30
Czechoslovakia	1.00	Panama	.05
Dominican Republic	.05	Paraguay	.05
Ecuador	.05	Peru	.25
Egypt	.70	Philippines	.05
El Salvador	.05	Poland	1.00
Ethiopia	.05	Union of South Africa	1.00
French Committee of National Liberation	4.00	U.S.S.R.	15.00
		United Kingdom	15.00
Greece	.50	U.S.A.	40.00
Guatemala	.05	Uruguay	.20
Haiti	.05	Venezuela	.10
Honduras	.05	Yugoslavia	.70
Iceland	.05		
			100.00

APPENDIX I TO THE REPORT OF COMMITTEE I

A Resolution Fixing the Composition of the Committee of the Council for Europe

Whereas, in paragraph 5 of Article III of the Agreement there is established a standing Committee of the Council for Europe and,

Whereas, the Agreement further provides that the said Committee "shall consist of all the members of the Council or their alternates, representing member governments of territories within the European area and such other members of the Council representing other governments directly concerned with the problems of relief and rehabilitation in the European area as shall be appointed by the Council;" and,

Whereas, the terms "Europe" and "European area" are not defined in the Agreement; it is therefore

Resolved

1. That for the purposes of the Committee of the Council for Europe, the terms "Europe" and "European area" shall be construed to include the entire continent of Europe, the British Isles, Iceland, and all islands in the Mediterranean.

2. That the Committee of the Council for Europe shall consist of the members of the Council or their alternates representing Belgium, Czechoslovakia, the French Committee of National Liberation, Greece, Iceland, Luxembourg, the Netherlands, Norway, Poland, the Union of Soviet Socialist Republics, the United Kingdom, and Yugoslavia, being countries included within the European area, and in addition the members of the Council or their alternates representing Brazil, Canada, and the United States of America.

3. That the Central Committee is authorized to appoint additional members to the Committee in cases of emergency between sessions of the Council, such appointments to continue until the next session of the Council.

APPENDIX II TO THE REPORT OF COMMITTEE I

A Resolution Fixing the Composition of the Committee of the Council for the Far East

Whereas, in paragraph 5 of Article III of the UNRRA Agreement there is established a "Committee of the Council for the Far East"; and,

Whereas, the Agreement further provides that the said Committee "shall consist of all the members of the Council, or their alternates, representing member governments of territories within the Far Eastern area and such other members of the Council representing other governments directly concerned with the problems of relief and rehabilitation in this Far Eastern area as shall be appointed by the Council"; and,

Whereas, the terms "Far East" and "Far Eastern area" are not defined in the Agreement; it is therefore

Resolved

1. That for the purpose of the Committee of the Council for the Far East the terms "Far East" and "Far Eastern area" shall be construed to include eastern continental Asia, the East Indies, Philippine Islands, Australia, New Zealand, and the Islands of the eastern Indian and western Pacific Oceans.

2. That the Committee of the Council for the Far East shall consist of the members of the Council or their alternates, representing Australia, China, the French Committee of National Liberation, India, the Netherlands, New Zealand, the Philippine Commonwealth, the United Kingdom, and the United States of America; and

3. That the Central Committee is authorized to appoint additional members to the Committee in cases of emergency between sessions of the Council, such appointments to continue until the next session of the Council.

APPENDIX III TO THE REPORT OF COMMITTEE I

A Resolution Relating to the Functions of the Committees of the Council for Europe and the Far East

Resolved

That the functions of the Committee of the Council for Europe and the Committee of the Council for the Far East shall be:

1. In the light of conditions prevailing in Europe and the Far East, and with the advice of such technical or special subcommittees as may be created, to recommend from time to time, as policies to be adopted by the Council, whatever basis or bases for over-all requirements the Committees think appropriate for the whole or parts of their respective areas; and to advise the Director General with respect to the computation of over-all requirements for their respective areas in conformity with the bases and policies approved by the Council.

2. To advise the Director General with respect to the fair and equitable apportionment of relief and rehabilitation supplies available to areas within the European and Far Eastern regions respectively where the Administration may operate; and to assist him in securing the maximum production and interchange of any surplus supplies which can be made available within each region, by promoting appropriate national or intergovernmental action on the part of member governments.

3. To receive and discuss the periodic reports covering the programs and activities of the Administration in Europe and the Far East, respectively; and to advise the Director General on the organization of measures to assist displaced persons and the coördination of national action in regard to medical and other relief and rehabilitation problems common to each region; and

4. Generally to consider relief and rehabilitation policies in Europe and the Far East, respectively; to formulate recommendations on such policies, and to discuss such recommendations with the Director General or his representative; and to transmit such recommendations to the Director General for distribution to the Council and the Central Committee.

APPENDIX IV TO THE REPORT OF COMMITTEE I

A Resolution Relating to the Creation and Composition of Standing Technical Committees

Whereas, many of the policy problems of the Council and of its regional committees are highly technical in character; and,

Whereas, in paragraph 6 of Article III of the Agreement, the creation of standing technical committees is authorized; it is therefore

Resolved

1. That the Council hereby creates standing technical committees on:

Agriculture

Displaced Persons

Health
Industrial Rehabilitation
Welfare

2. That such committees shall consist of such members of the Council as indicate to the Director General their intention to participate in the work of a committee or committees, or of alternates nominated by such members of the Council as shall elect to do so, such alternates to possess special competence in the problems relating to the work of the committee to which they are nominated.

3. That the Central Committee is hereby authorized to make any further arrangements necessary in regard to the work of these committees and to make emergency appointments between sessions of the Council, such appointments to continue until the next session of the Council.

APPENDIX V TO THE REPORT OF COMMITTEE I

A Resolution Relating to the Functions of the Committee on Agriculture

Resolved

That the functions of the standing technical Committee on Agriculture shall be:

1. To advise the Council, the Central Committee and the Director General as to the nature of and scope of problems relating to agriculture, fisheries and food production and the rehabilitation of industries concerned therewith in areas in which the Administration will operate.

2. Periodically to review the programs of the Administration with regard to agriculture, fisheries, food production, and related subjects, and consult with the Director General thereon with respect to any suggested modifications.

3. To formulate proposals on technical policies in regard to agriculture, fisheries and food production and the rehabilitation of the industries concerned therewith and related subjects, discuss such proposals with the Director General, and transmit such proposals to the Director General for distribution to the Council and the Central Committee; and

4. When requested by and in consultation with the Committees of the Council for Europe or for the Far East or such other regional committees as may hereafter be established, to appoint subcommittees to advise the regional committee and the chief representative of the Director General in the region concerned with respect to agriculture, fisheries and food production and the rehabilitation of the industries concerned therewith and related subjects.

APPENDIX VI TO THE REPORT OF COMMITTEE I

A Resolution Relating to the Functions of the Committee on Displaced Persons

Resolved

That the functions of the standing technical Committee on Displaced Persons shall be:

1. To advise the Council, the Central Committee, and the Director General on the organization of the work of the Administration in assisting in the repatriation and return of persons who have been obliged to leave their homes as a result of the war.

2. Periodically to review the programs of the Administration with respect to displaced persons with a view to calling the attention of the Council to any features in those programs which in their view require modification; and

3. When requested by, and in consultation with, the Committees of the Council for Europe or for the Far East or such other regional committees as may hereafter be established, to appoint subcommittees to advise the regional committee and the chief representative of the Director General in the region concerned, with respect to problems of displaced persons.

APPENDIX VII TO THE REPORT OF COMMITTEE I

A Resolution Relating to the Functions of the Committee on Health

Resolved

That the functions of the standing technical Committee on Health shall be:

1. To advise the Council, the Central Committee and the Director General as to the nature and scope of problems relating to health, medicine, and nutrition in areas in which the Administration will operate.

2. Periodically to review the programs of the Administration in the health, medical, nutrition and related fields, and consult with the Director General thereon with respect to any suggested modifications.

3. To formulate proposals on technical policies relating to health, medical, nutrition and related fields, discuss such proposals with the Director General, and transmit such proposals to the Director General for transmission to the Council and to the Central Committee; and

4. When requested by, and in consultation with, the Committees of the Council for the Far East or for Europe, or such other regional committees as may hereafter be established, to appoint subcommittees to advise the regional committee and the chief representative of the Director General in the region concerned, with respect to health and related special problems.

APPENDIX VIII TO THE REPORT OF COMMITTEE I

A Resolution Relating to the Functions of the Committee on Industrial Rehabilitation

Resolved

That the functions of the standing technical Committee on Industrial Rehabilitation shall be:

1. To advise the Council, the Central Committee and the Director General as to the nature of and scope of problems in fields relating to the rehabilitation of public utilities and services, to the rehabilitation of industries producing urgently needed goods, and to rehabilitation supplies in areas in which the Administration will operate.

2. Periodically to review the programs of the Administration in such fields of industrial rehabilitation, and consult with the Director General thereon with respect to any suggested modifications.

3. To formulate proposals on technical policies relating to the rehabilitation of public utilities and services, to the rehabilitation of industries producing urgently needed goods, and to rehabilitation supplies, to discuss such proposals with the Director General, and transmit such proposals to the Director General for distribution to the Council and to the Central Committee; and

4. When requested by, and in consultation with the Committees of the Council for Europe or for the Far East or such other regional committees as may hereafter be established, to appoint subcommittees to advise the regional committee and the chief representative of the Director General in the region concerned, with respect to problems of industrial rehabilitation.

APPENDIX IX TO THE REPORT OF COMMITTEE I

A Resolution Relating to the Functions of the Committee on Welfare

Resolved

That the functions of the standing technical Committee on Welfare shall be:

1. To advise the Council, the Central Committee, and the Director General as to the nature and scope of welfare problems in areas in which the Administration will be operating: including the direct provision to victims of war of relief through other than normal economic channels of distribution; emergency measures for the care of children, expectant and nursing mothers, the aged and disabled, and other victims of war; and the measures necessary to secure the effective coöperation in this work of voluntary relief organizations.

2. Periodically to review the programs of the Administration in the above fields and consult with the Director General with respect to any suggested modifications.

3. To formulate proposals on technical policies relating to welfare problems, discuss such proposals with the Director General, and transmit such proposals to the Director General for distribution to the Council and the Central Committee; and

4. When requested by and in consultation with the committees of the Council for Europe or for the Far East or for such other regional committees as may hereafter be established, to appoint subcommittees to advise the regional committee and the chief representative of the Director General in the region concerned, with respect to welfare problems.

APPENDIX X TO THE REPORT OF COMMITTEE I

A Resolution Relating to Facilities and Immunities for the Administration, Its Council and Committee Members and Its Staff

Whereas, the Council is desirous of ensuring to the Administration and its agents the independence necessary for the efficient performance of the duties

entrusted to them, and of avoiding the imposition of financial burdens upon the funds contributed by member governments to the Administration; it is therefore

Resolved

I. That the Council recommends

1. That the member governments accord to the Administration the facilities, privileges, immunities, and exemptions which they accord to each other, including

(*a*) immunity from suit and legal process except with the consent of, or insofar as is provided for in any contract entered into by or on behalf of, the Administration;

(*b*) inviolability of premises occupied by and of the archives of the Administration;

(*c*) exemptions from taxation, including customs duties;

(*d*) exemptions from or facilities in respect of foreign exchange controls.

2. That member governments take any steps that they may consider necessary to enable the Administration to exercise within their jurisdiction the powers conferred on it by Article I, paragraph 1, of the Agreement.

3. That member governments accord to representatives of member governments on the Council and its committees and to the officials and employees of the Administration when engaged on the business of the Administration, the following privileges and immunities in their respective territories:

(*a*) immunity from legal process of any kind in respect of acts performed by them in their official capacity and falling within their functions as such;

(*b*) immunity from taxation on official salaries, allowances or other emoluments as representatives, officials, or employes of the Administration;

(*c*) the same immunities from immigration restrictions, alien registration and military service obligations and the same facilities as regards exchange restrictions as are accorded to representatives, officials and employes of similar rank of other member governments;

(*d*) any further privileges and immunities that the Director General may request as necessary to safeguard representatives, officials or employes in the territories of any member government where they are engaged and particularly those engaged in field operations in the areas in which the Administration may be undertaking relief and rehabilitation.

Provided that each member government shall determine to what extent the above recommendations shall apply to its own nationals, and to non-nationals in permanent residence in its territories.

4. That the member governments make any necessary arrangements with the Director General for the application of the foregoing recommendations.

II. That the Council requests the Director General

1. To initiate immediate negotiations with member governments to bring such arrangements into operation as rapidly as possible.

2. Wherever appropriate, to approach non-member governments with a view to their granting such of the above-mentioned facilities, privileges, immunities and exemptions as may be desirable to facilitate the work of the Administration.

APPENDIX XI TO THE REPORT OF COMMITTEE I

A Resolution Relating to Official Correspondence of the Administration

Whereas, the Council recognizes the need for expedition, economy and secrecy in the transmission of the official correspondence of the Administration; it is therefore

Resolved

I. That the Council recommends

1. That the member governments accord to the official correspondence of the Administration

(*a*) the same treatment as is accorded by them to the official correspondence of other member governments, including:

(i) priorities for telephone and telegraph communications, whether cable or radio, and for mail transmitted by pouch or by courier;

(ii) government rebates for official telegrams;

(iii) diplomatic status for couriers and pouches of the Administration;

(iv) under appropriate safeguards, exemption from censorship of the official correspondence of the Administration;

(v) appropriate arrangements for the use of codes and of cable addresses for the telegraphic correspondence of the Administration.

(*b*) appropriate postal facilities, including such franking privileges or arrangements for the use of specially printed or overprinted stamps as may be possible.

2. That the member governments make any necessary arrangements with the Director General for the application of the foregoing recommendations.

II. That the Council requests the Director General

1. To initiate immediate negotiations with member governments to bring such arrangements into operation as rapidly as possible.

2. Wherever appropriate, to approach non-member governments with a view to their granting such of the above-mentioned facilities, privileges, immunities and exemptions as may be desirable to facilitate the work of the Administration.

APPENDIX XII TO THE REPORT OF COMMITTEE I

A Resolution Relating to Travel Facilities for the Staff of the Administration

Whereas, the Council has in mind the importance of securing the expeditious and unhindered travel of officials and employees of the Administration necessary to permit the prompt fulfillment by the Administration of the urgent tasks entrusted to it; it is therefore

Resolved

I. That the Council recommends:

1. That the Director General issue to officials and employees of the Administration for use when traveling on official business a document identifying the official or employee and requesting in the name of the Administration that all appropriate facilities be granted to the bearer.

2. That all member governments give full recognition to such documents and instruct their diplomatic, consular, customs and immigration services and any other services which may be concerned to recognize such documents as entitling the bearer to all appropriate facilities.

3. That in respect of passports and visas the member governments accord to the officials and employees of the Administration the same treatment as is accorded to the officials and employees of comparable rank of their own or other governments.

4. That all member governments take the necessary steps to grant all appropriate and possible priorities for the travel of the officials of the Administration on official business and government rebates for such travel.

5. That the member governments make any necessary arrangements with the Director General for the application of the foregoing recommendations.

II. That the Council requests the Director General

1. To initiate immediate negotiations with member governments to bring such arrangements into operation as rapidly as possible.

2. Wherever appropriate, to approach non-member governments with a view to their granting such of the above-mentioned facilities, privileges, immunities and exemptions as may be desirable to facilitate the work of the Administration.

APPENDIX XIII TO THE REPORT OF COMMITTEE I

Rules of Procedure of the Council

[For Rules of Procedure of the Council, and Annex I, Rules of Standing Committees of the Council, see *ante*, pp. 69 to 79.]

APPENDIX XIV TO THE REPORT OF COMMITTEE I

Regulations With Respect to Expenditures and Receipts of the Administration

1. The fiscal year of the Administration shall be the calendar year.

2. The Director General shall submit to the Council at its regular session next preceding the commencement of the calendar year an annual budget covering the estimated administrative expenses of the Administration for that year. The budget for the calendar year 1944 shall include estimated administrative expenditures for the year 1944 and for the unelapsed part of the year 1943. The budget shall be accompanied by a statement of the estimated receipts, a statement of the actual expenditures through the end of the quarter preceding the submission of the budget, and by an explanation and justification of the amount budgeted.

3. The Director General may submit to any session of the Council supplementary budgets or a budget amending a previously approved budget.

4. The proposed budget or a supplementary budget shall be referred for consideration to the appropriate committee of the Council for report, comment, and recommendation for action by the Council.

5. The approval of the budget or a supplementary budget by the Council shall make available to the Director General from the general resources of the Administration, for obligations and expenditures for administrative purposes during the year to which the budget relates, the amount specified therein but not exceeding such amount.

6. Pending the consideration which may be required for the final determination of a method of allocation, the amount of administrative expenses of the Administration approved by the Council in the annual budget or in a supplementary budget shall be allocated for the year 1944 to member governments in the proportions shown in the resolution adopted by the Council relating to the Administrative Budget and the allocation of administrative expenses. The consideration of the question whether the proportions shown in the Appendix require revision in order to provide a method of allocation for subsequent years appropriate to the Administration shall be referred to an appropriate committee of the Council upon its establishment. The Council recognizes that the criterion of allocations hitherto adopted by other bodies is not suitable to the Administration.

The allocation to member governments for the succeeding year shall be adjusted for any differences between the provisional allocations and those finally determined.

Upon the admission of a government as a member, its share of administrative expense shall be fixed by the Council upon recommendation by the appropriate committee of the Council.

7. Each member government undertakes, subject to the requirements of its constitutional procedure, to contribute to the Administration promptly its share of the administrative expenses so determined. A member govern-

ment may treat its share of the administrative expense as included in its general contribution for participation in the work of the Administration.

8. The Director General shall prescribe the procedure for setting up and maintaining accounts showing administrative and operating expenditures and the receipts from each government of its contribution, including its share of the administrative expense.

9. The Director General shall make provision for the bonding of employees to insure the Administration against loss by their acts.

10. The Director General shall designate the depositories of any funds held in the name of the Administration.

11. The Director General shall, in consultation with the appropriate member government, select such fiscal agents for the Administration as he may require.

12. The Director General shall submit to the appropriate committee of the Council, quarterly reports of operating and administrative expenditures and receipts, and copies thereof furnished to each member of the Council.

13. Upon nomination by the appropriate committee of the Council the Council shall appoint a person or firm to make annually an independent audit of the accounts and records of the Administration, and a copy of each audit shall be furnished to each member of the Council.

APPENDIX XV TO THE REPORT OF COMMITTEE I

Message of the Director General Submitting the Administrative Budget for the Fiscal Year 1944 and the Unelapsed Part of the Year 1943

(Estimate by the Director General of Administrative Expenditures and Receipts, and an Explanation and Justification of the Estimates)

To: The Council:

The *Ad Hoc* Subcommittee on the Administrative Budget:

As required by Article VI of the United Nations Relief and Rehabilitation Administration Agreement and the appropriate regulations, I am submitting to the Council my estimates of the administrative expenses and receipts for the year 1944 and the unelapsed part of the year 1943. By Council action, the *Ad Hoc* Subcommittee on the Administrative Budget is the appropriate body of the Council to receive and consider these estimates. The Expenditures and Receipts are each estimated, for the period ending December 31st, 1944, at $10,000,000.

The estimate of $10,000,000 required for administrative expenditures is subdivided as follows:

For Salaries and Other Personal Services:	
For headquarters, regional offices, committee staffs, and other activities except field missions	$ 4,800,000
For field missions	4,000,000
Total Salaries and Personal Service	$ 8,800,000

For Expenditures Other Than Salaries and Personal Service, Including:	
Living quarters, post and representation allowances, travel, communication, administrative supplies and equipment, other contractual services, and general expense	$3,000,000
Total Personal and Other Than Personal Service	$11,800,000
Less Anticipated Accruals From Non-expenditure—30% of Above	3,540,000
Total Planned Expenditures	$ 8,260,000
Undistributed Appropriation to Meet Contingencis	1,740,000
Total Estimated Expenditures	$10,000,000
Estimated Receipts From Contributions From Member Governments	10,000,000

The Council will not have supposed that I should be able at this time to present a budget based upon a definite pattern of organization, nor would it have desired me to do so. Even in respect to the administrative organization (as distinguished from field missions), it is evident that the pattern of organization must wait upon the completion of the work of this first session of the Council, and then upon the analysis of the activities to be undertaken by the Director General, the regional offices and various committees, and upon discussion of the most efficient organization with representative members of the Council and others. While I expect to begin assembly of a staff immediately, I shall not determine the final form of the administrative organization until I shall have had time fully to analyze all the actions of the first session of the Council.

From an examination of the tasks which must be undertaken by that part of the administrative organization which is responsible for executive activities, for programming, for arrangements for procurement and for accounting, audit, services as secretariat to the Council, and for all the other non-field services which are required for an organization of this kind, it is evident that within the next few months a substantial number of employees will be required. Some of these employees will be in Washington, some in a European office, some in a Far Eastern office and some in other places, such as for example, Cairo. I cannot yet determine the relative needs of such offices. Because of the size of the task which lies ahead of the Administration, the urgency of its mission, and the fact that in substantial measure its work will be that of coördination, it must secure the most competent employees possible, and it will be necessary to pay them adequate salaries related to this high degree of competence. I estimate that the cost of compensation for these employees on an annual basis will amount to approximtely $4,800,000.

For the field missions to be established during the year 1944 it will likewise be necessary to attract persons of outstanding ability and pay them commensurately. It is obvious that no definite forecast of the number of missions, or their size, or the time when they will commence to operate is

possible at the present time. I have assumed that the missions would vary greatly in size, ranging from perhaps not more than ten persons in areas where an existing government is prepared to assume all administration of relief and rehabilitation, to as many as 250 persons in areas where the government desires more assistance in the organization of relief and rehabilitation activities during a period of disorganization following reoccupation of the territory. I am aware of the desire of some governments for technical personnel in considerably larger numbers than those mentioned, and I shall do my utmost to be of the greatest possible assistance in that connection. But I believe that where such technical personnel is furnished to the government of a liberated area to engage directly in relief and rehabilitation activities as distinguished from administrative supervision—the charge for salaries is properly an operating expenditure and not to be charged to the administrative budget. The figures given, therefore, are not to be read as an indication that such technical personnel will not be made available. That question remains for future decision in the light of circumstances as they develop, and the requests and needs of the different governments.

For the field mission employees, I believe that an estimate of $4,000,000 for salaries and personal service is a reasonable figure. Although I can make no final commitment, I would expect that UNRRA employment, apart from field missions, is unlikely to increase after 1944. On the other hand, at the peak of operation the staffs of the field missions may well be much larger than the number needed in 1944. Exactly how much larger no one can tell.

In addition to salaries for personnel, there must necessarily be very substantial items of expenditure. Those persons who are assigned to work far from their homes and away from their families must in many cases be given an added allowance to compensate them for the extra cost of maintaining their regular homes and maintaining themselves in a foreign post, sometimes under expensive conditions. This is a recognized practice of government. The cost of travel will undoubtedly be heavy because of the vast distances over which the Administration must operate. The cost of communications will likewise be heavy because of the need for constant interchange of cabled information. The estimate of expenditures for supplies and equipment, for other contractual services and for general expense is based upon normai government experience. For these items I have estimated a total expenditure of $3,000,000 until the end of 1944. In fixing this sum I have taken a very conservative figure, in light of the expenditures of United States public agencies engaged in similar activities, but I believe that a determined effort at economy will make it possible to keep within the figure.

The total personal and other than personal service estimate is $11,800,000. This figure is on an annual basis, assuming full service of all personnel for a full year. It is obvious that the total personnel will not be employed for the full year. Even as to the selection of the administrative personnel, it will take

time to find the right people for the right places, and a certain amount of the annual salary will remain unspent because some individuals will not go on the payroll until well after January first. In respect to the field missions, there will be a larger difference between full annual salaries and actual expenditures because many of the missions will not commence to operate until well into the year 1944.

Similarly, because the Administration will not be engaged in its full scope of activity in its early months of existence, expenses for other than personal services will be less than would be required for full operation for the entire year. I estimate that on an overall basis, 30 per cent of the estimated full annual amount will remain unspent, and I have, therefore, deducted from the estimate the amount of $3,540,000, leaving a net of $8,260,000 as the estimate of the total planned expenditures.

But it will also be evident to the members of the Council that in an operation of this character, there must be provision to meet very substantial expenditures for activities the exact nature, location and time of which we cannot now foresee, but which are bound to develop. Indeed, throughout the life of the Administration I anticipate that we shall meet constantly the unexpected, and we must always make adequate provision for it. Obviously, it is impossible to make any accurate estimate of the amount which should be reserved for those unplanned activities but, in order to have a sufficient provision, I have requested this provision in the amount of $1,740,000 to be available to the Director General to meet contingencies as they arise. If the amount is not needed, it will not be spent. If it is needed, the need will be urgent and the money must be available.

Accordingly, the total amount of the budget, approval of which is requested by the Council for the year 1944 and for the unelapsed part of the year 1943, is $10,000,000.

Estimate of Receipts

Under Article VI of the Agreement provision is made that—

> Upon approval of a budget by the Council the total amount approved shall be allocated to the member governments in proportions to be determined by the Council. Each member government undertakes, subject to the requirements of its constitutional procedure, to contribute to the Administration promptly its share of the administrative expenses so determined.

The subcommittee on the administrative budget has proposed an allocation of administrative expenses among the 44 member nations of the Administration. The financial plan approved by the Subcommittee on Finance provides that the share of administrative expenses allocated to each member government may be included by the government in its general contributions for participation in the work of the Administration. Under the

allocations approved by the Subcommittee on the Administrative Budget, the smallest contribution from any member government will be $5,000, and the largest contribution will be $4,000,000, if the Council shall approve my request for a $10,000,000 budget.

I have based my estimates of receipts to meet administrative expenses upon the assumption that every member government will contribute to UNRRA at least the amount of its allocation for administrative expenses.

Form of Appropriation

In view of the lack of experience with administrative expenditures for UNRRA, it would be desirable to have the greatest possible flexibility in the use of the appropriation voted by the Council. Indeed I am not certain that the experience during any year of the life of UNRRA will ever be a very good guide as to what may be expected in the next. The most effective use of the administrative appropriation will be possible if it is voted as a lump sum, subject to allocation at the discretion of the Director General in the light of circumstances as they develop. In other words, while I have indicated the amount which I presently believe will be required for salaries for administrative personnel, for field personnel, for other than personal service, and for contingencies, developments may show that more is needed for one purpose and less for another, and it would be helpful if an appropriation of the Council might be for a single sum of $10,000,000.

Control of Administrative Expenditures

The regulations approved by the Subcommittee on the Administrative Budget provide for the establishment and maintenance of accounts under the direction of the Director General. As soon as the Council shall approve a budget, the Director General will establish the necessary accounting system and will also promulgate appropriate regulations designating the officials and determining the procedures under which expenditures of administrative funds may be authorized or made.

I am deeply conscious of the fact as head of the United Nations Relief and Rehabilitation Administration, charged with the relief of human misery and suffering throughout the world, I must make every effort to assure the wise and economical use of the Administration's resources. I give to the Council my assurance that no expenditure will be made from the sum which it may approve for administrative expenses except where such expenditure is necessary, and where it contributes to the ultimate purpose of the Administration—the relief and rehabilitation of the victims of war who have suffered so tragically from enemy plunder and exploitation.

Respectfully submitted,

HERBERT H. LEHMAN
Director General

Reports of Committee II

Report of the Committee on General Policy

The Committee on General Policy, having been established by the Council at its first session and having met and considered the reports submitted by its subcommittees, submits the following report to the Council.

A. The Scope of the Activities of the Administration

With reference to the broad policies relating to the scope of the activities of the Administration, the Committee recommends that the Council adopt the following resolution:

A Resolution Relating to the Scope of the Activities of the Administration

Resolved

That the following shall be the broad policies of the Administration with respect to the scope of its activities:

I. Areas in Which the Administration Will Operate

The exact geographical areas in which the Administration will operate and the kind of operations it will undertake in each case must be determined by the Director General (in the light of policies laid down from time to time by the Council) only after consultation with, and with the consent of, the government or authority (military or civil) which exercises administrative authority in the area. The Administration's activities in seeking to achieve the objectives referred to in the preamble of the Agreement setting up will be governed as follows:

1. In the case of a liberated area in which a government or recognized national authority does not yet exercise administrative authority, the Administration will operate from such a time and for such purposes as may be agreed upon between the military command and the Administration, and subject to such control as the military command may find necessary. The Administration shall, so far as circumstances permit, seek the advice of the government or recognized national authority concerned.

2. In the case of a liberated area in which a government or recognized national authority exercises administrative authority, the Administration will operate only after consultation with, and with the consent of, the government or recognized national authority concerned regarding the form of activities to be undertaken by the Administration within the whole or part of such area.

3. If it appears necessary for the Administration to operate in an enemy or ex-enemy area in carrying out the purposes of the Agreement, it will do so only from such a time and for such purposes as may be agreed upon between the military command, the established control authority or duly recognized administration of the area on the one hand

and the Administration on the other, and subject to such control as the military command or the established control authority may find necessary; provided that the Council approve the scale and nature of the operations it is proposed to undertake and the standard of provision, and that all expenses connected with such possible operations in an enemy or ex-enemy area should be carried by the enemy or ex-enemy country concerned. The Director General will consult with the military command or established control authorities having control of enemy or ex-enemy areas with a view to securing information as to any surpluses of supplies from time to time available in such enemy or ex-enemy areas from which relief and rehabilitation import requirements of liberated areas might be met.

Nothing in the above should be taken as preventing the Administration from carrying on activities in other areas in order to perform the tasks laid upon it in the Agreement, provided that the government or authority (military or civil) exercising administrative authority in the area concerned agrees.

II. The Range of Services Which the Administration Will Provide

The supplies and services of which the Administration will seek to insure the provision fall under four heads:

1. *Relief supplies:* essential consumer goods to meet immediate needs, such as food, fuel, clothing, shelter, medical supplies.
2. *Relief services:* such as health and welfare; assistance in caring for, and maintaining records of, persons found in any areas under the control of any of the United Nations who by reason of war have been displaced from their homes and, in agreement with the appropriate governments, military authorities or other agencies, in securing their repatriation or return; and such technical services as may be necessary for these purposes.
3. *Rehabilitation supplies and services:* materials (such as seeds, fertilizers, raw materials, fishing equipment, machinery and spare parts) needed to enable a recipient country to produce and transport relief supplies for its own and other liberated areas, and such technical services as may be necessary for these purposes.
4. *Rehabilitation of public utilities and services:* so far as they can be repaired or restored to meet immediate needs: such as light, water, sanitation, power, transport, temporary storage, communications, and assistance in procuring material equipment for the rehabilitation of educational institutions.

III. Relation of the Administration With Existing Intergovernmental Authorities and Agencies Established to Deal With Supplies, Shipping, and Related Questions.

1. The activities of the Administration in bringing assistance to the victims of war will be so conducted that they do not impede the effective prosecution of the war. The prosecution of the war demands that scarce supplies and shipping tonnage shall be carefully controlled and allocated in order to assure not only that the supplies and shipping requirements of the armed forces are fully met, but also that a fair distribution of supplies is made between the civil populations of the various areas having due regard to their actual or potential contribution to the war effort. It will therefore be essential, both for the conduct of the war and in order to promote a fair distribution of supplies between the inhabitants of areas with which the Administration is concerned and those of other areas, that demands upon supplies and shipping presented by the Administration should be coördinated with other demands through the use of the existing intergovernmental agencies concerned with the allocation of supplies and shipping.

2. It will be an essential part of the functions of the Administration to secure a fair distribution of goods which are in short supply and of shipping services to and among the various areas liberated or to be liberated. For this purpose the Administration must have full knowledge of all the relief and rehabilitation import requirements of such areas, whatever arrangements may be contemplated for procurement or finance. Therefore, member governments shall keep the Administration fully informed of their requirements and programs of intended purchases. The Director General may present to the intergovernmental allocating agencies such recommendations or objections as he may deem necessary to obtain a fair distribution to and among both liberated and to be liberated areas. The Director General will present before the intergovernmental allocating agencies the over-all requirements for relief and rehabilitation of all areas liberated and to be liberated in order to permit a global consideration of these needs with all other needs. He may also present the particular requirements of any country for which the assistance of the Administration has been requested. It is anticipated that the Director General and, where necessary, the Chairman of the Committee on Supplies, will be fully consulted by the intergovernmental allocating agencies when any matter touching the interests of the Administration is under discussion.

3. In order that the supplies allocated by the appropriate intergovernmental agency against requirements presented and supported by the Administration may be procured expeditiously and without duplication of effort, the Director General, after consultation, where necessary, with the appropriate intergovernmental agency, will make use wherever possible of the established national agencies concerned with the procurement, handling, storage and transport of supplies. The member governments to which such national agencies are responsible would agree on their part to put the services of such agencies at the disposal of the Administration. Such additional responsibili-

ties would form part of those already undertaken in prosecuting the war effort of the United Nations.

IV. Relationship of the Administration with the Military Command

1. Before an area is liberated, the Administration will, when requested by the military authorities,

(*a*) consult with them in the planning of supplies for the relief and rehabilitation of the area during the period of military control;
(*b*) arrange for the advance procurement of such supplies as may be agreed on to supplement supplies to be provided by the military authorities.

2. During the period when a liberated area is under military control, the Administration, insofar as the Director General deems practicable, will, when requested by the military authorities,

(*a*) arrange for the procurement of supplies to supplement supplies being provided by the military authorities;
(*b*) furnish expert personnel and services, and advise on the conservation and utilization for relief purposes of stocks and productive resources;
(*c*) assist in the carrying out of policies with regard to the repatriation or return of displaced persons as formulated in paragraph II, 2, above;
(*d*) undertake other relief and rehabilitation activities;
(*e*) assume responsibility in whole or in part for such activities.

In undertaking any of these functions the Administration shall, so far as circumstances permit, seek the advice of the government or recognized national authority concerned.

3. It is recommended to the member governments that the Administration be kept informed so far as is practicable of the operations of the civil affairs branches of the military command and control authorities, in order that the Director General may make the necessary preparations for the provision of staff and facilities so that a smooth transition from the period of military control may be insured and the flow of supplies maintained.

4. It is recommended to member governments that the transition in each area from military to civilian relief and rehabilitation operations be consummated at the earliest date that military considerations permit.

B. Relations With Governments

The Committee considered a number of problems concerning the relations between the Administration and governments, and reached the following conclusions:

1. Communications With Member Governments

The Committee recognizes that prompt and efficient communication between the Administration and member governments is essential to the effective discharge by the Director General of the responsibilities and duties placed upon him by the Agreement and by the Council. It is, therefore, desirable that the Director General be given latitude with regard to the channels and methods to be used by him in communicating with member governments. While, in matters involving important policy or the rights or obligations of governments arising out of the Agreement, communication should be through the foreign offices of the member governments, there will be occasions when direct contact with technical or administrative governmental or intergovernmental agencies will lead to the greatest efficiency of operation. Also, in certain cases, communication with or through representatives on regional or other standing committees of the Council will provide the most effective channel, particularly in the case of matters of a peculiarly regional or technical character.

It is recommended that the definition of channels and methods of communication with member governments be left to the Director General to work out in collaboration with each such government.

2. Immunities and Priorities for Transit Goods

The Committee recommends that the Council adopt the following resolution:

A Resolution Relating to Immunities and Priorities for Transit Goods

Resolved

That the Council recommends that each member government expedite to the extent possible supplies and equipment of the Administration in transit, and that it exempt such supplies and equipment of the Administration from adverse legal action or seizure.

3. Collaboration With Regard to Economic Measures

The Committee recommends that the Council adopt the following resolution:

A Resolution Relating to Collaboration With Regard to Economic Measures

Resolved

That the Council recommends that member governments consult with the Director General with a view to avoiding, so far as possible, the subjection of the funds, supplies, equipment and services of the Administration to economic measures which might diminish the effectiveness of such activities or impose financial burdens on the Administration.

4. Assistance From Member Governments

The Committee recommends that the Council adopt the following resolution:

A Resolution Relating to Assistance From Member Governments

Resolved

That the Council recommends that member governments take such steps as may be necessary and feasible to facilitate any operations of the Administration within areas under their control, assisting the Administration in obtaining such services, facilities and personnel as may be required to carry on such operations, and arranging to the extent possible that the Administration's expenditures for services, facilities, supplies, equipment, and personnel be minimized so that its resources may be devoted directly to relief and rehabilitation.

5. Non-discrimination

The Committee recommends that the Council adopt the following resolution:

A Resolution Relating to Non-discrimination

Resolved

1. That, in any area where relief and rehabilitation operations are being conducted through the employment, in whole or in part, of the Administration's resources, relief and rehabilitation in all its aspects shall be distributed or dispensed fairly on the basis of the relative needs of the population in the area, and without discrimination because of race, creed or political belief.

2. That, in determining the relative needs of the population, there may be taken into account the diverse needs caused by discriminatory treatment by the enemy during its occupation of the area.

6. Administration Publicity

The Committee recommends that the Council adopt the following resolution:

A Resolution Relating to Administration Publicity

Resolved

That the Council recommends that member governments, consistently with such measures as they consider necessary to regulate the dissemination of information while hostilities or other military necessities exist, afford the Administration opportunity to make public information with regard to its operations, and that they permit the use of special labels or other designations on supplies and equipment belonging to or furnished by the Administration.

7. Channels of Communication With Non-member Governments (Neutrals)

The Committee, mindful of the absence of any direct reference in the Agreements to relations between the Administration and non-member governments (neutrals) has given consideration to the question whether or not it might be desirable that the Council formulate a policy with regard to procedures for communication with non-member governments (neutrals).

The Committee is of the opinion that it would be desirable that the Director General have latitude with regard to the methods and channels of communication with non-member governments (neutrals). It is recommended that member governments extend to the Director General technical facilities for communicating with neutral governments, and the Committee accordingly recommends that the Council adopt the following resolution:

A Resolution Relating to Communications With Neutral Governments

Resolved

That the Council recommends that member governments extend to the Director General technical facilities for communicating with governments neutral in the present conflict.

8. Procedures for Admission

It is recommended that no general principle be laid down at this time for the admission of non-member governments and that applications for admission to the Council should be considered by the Council as individual applications are received.

C. Relations With Other Intergovernmental Agencies

With reference to relations between the Administration and intergovernmental agencies other than intergovernmental authorities and agencies established to deal with supplies, shipping and related questions, the Committee recommends that the Council adopt the resolution set forth below. It is the view of the Committee that, if this resolution be adopted, the organizations named in paragraph 2 thereof will be invited by the Director General to send observers to future sessions of the Council without the necessity of further action being taken thereon by the Council.

A Resolution Relating to the Relations of the Administration With Intergovernmental Agencies Other Than Those Established to Deal With Supplies, Shipping, and Related Questions

Resolved

1. That the Council reaffirms the principle of coöperation between the Administration and other intergovernmental agencies as set forth in the report of the Temporary Committee on Admission of Observers adopted by the Council on November 12, 1943.

2. That the Council invite representatives of the League of Nations Technical Organizations, the International Labor Organization, the Intergovernmental Committee on Refugees, and the United Nations Interim Commission on Food and Agriculture (or representatives from the Permanent Organization for Food and Agriculture now represented by the Interim Commission), to attend as observers and to participate in the meetings of the Council, its committees, and subcommittees, and in the meetings of regional committees

and technical standing committees, in accordance with appropriate provisions in the Permanent Rules of Procedure.

3. That the Director General avail himself of the organizations mentioned in paragraph 2 above as the nature of the work and other circumstances make appropriate.

4. That the Director General, in pursuance of the principle set forth in paragraph 1 above, coöperate to such a degree and to such extent as he may deem desirable in the interests of the Administration with all other intergovernmental agencies whose operations and specialized services may be of value to the Administration, including the sending of his representatives as observers to the meetings of other intergovernmental agencies, as well as those mentioned in paragraph 2 above.

AUSTRALIA, NEW ZEALAND

AGREEMENT *

January 21, 1944

His Majesty's Government in the Commonwealth of Australia and His Majesty's Government in the Dominion of New Zealand (hereinafter referred to as the two Governments) represented as follows:

The Government of the Commonwealth of Australia by the Right Honorable John Curtin, Prime Minister of Australia and Minister for Defense; the Honorable Francis Michael Forde, Minister for the Army; the Honorable Joseph Benedict Chifley, Treasurer and Minister for Postwar Reconstruction; the Right Honorable Herbert Vere Evatt, LL.D., K.C., Attorney-General and Minister for External Affairs; the Honorable John Albert Beasley, Minister for Supply and Shipping; the Honorable Norman John Oswald Makin, Minister for the Navy and Minister for Munitions; the Honorable Arthur Samuel Drakeford, Minister for Air and Minister for Civil Aviation; the Honorable John Johnstone Dedman, Minister for War Organization of Industry; the Honorable Edward John Ward, Minister for Transport and Minister for External Territories; and the Honorable Thomas George de Largie D'Alton, High Commissioner for Australia in New Zealand, and

The Government of the Dominion of New Zealand by the Right Honorable Peter Fraser, Prime Minister of New Zealand, Minister for External Affairs and Minister of Island Territories; the Honorable Frederick Jones, Minister of Defense and Minister in Charge of Civil Aviation; the Honorable Patrick Charles Webb, Postmaster-General and Minister of Labor; and Carl August Berendsen Esquire, C.M.G., High Commissioner for New Zealand in Australia.

Having met in conference at Canberra from the 17th to the 21st January,

* Text issued by Australian News and Information Bureau.

1944, and desiring to maintain and strengthen the close and cordial relations between the two Governments, do hereby enter into this agreement:

Definition of Objectives of Australian-New Zealand Coöperation

1. The two Governments agree that as a preliminary, provision shall be made for fuller exchange of information regarding both the view of each Government and the facts in the possession of either bearing on matters of common interest.

2. The two Governments give mutual assurances that on matters which appear to be of common concern each Government will so far as possible be made acquainted with the mind of the other before views are expressed elsewhere by either.

3. In furtherance of the above provisions with respect to exchange of views and information, the two Governments agree that there shall be the maximum degree of unity in the presentation elsewhere of the views of the two countries.

4. The two Governments agree to adopt an expeditious and continuous means of consultation by which each party will obtain directly the opinions of the other.

5. The two Governments agree to act together in matters of common concern in the Southwest and South Pacific areas.

6. So far as compatible with the existence of separate military commands the two Governments agree to co-ördinate their efforts for the purpose of prosecution of the war to a successful conclusion.

Armistice and Subsequent Arrangements

7. The two Governments declare that they have vital interest in all preparations for any armistice ending the present hostilities or any part thereof, and also in arrangements subsequent to any such armistice and agree that their interests should be protected by representation at the highest level on all armistice planning and executive bodies.

8. The two Governments are in agreement that the final peace settlement should be made in respect of all our enemies after hostilities with all of them are concluded.

9. Subject to the last two preceding clauses, the two Governments will seek agreement with each other on the terms of any armistice to be concluded.

10. The two Governments declare that they should actively participate in any armistice commission to be set up.

11. His Majesty's Government in the Commonwealth of Australia shall set up in Australia, and His Majesty's Government in the Dominion of New Zealand shall set up in New Zealand armistice and post-hostilities planning committees and shall arrange for the work of these committees to be coördinated in order to give effect to the views of the respective Governments.

12. The two Governments will collaborate generally with regard to the

location of machinery set up under international organization such as the United Nations Relief and Rehabilitation Administration, and in particular with regard to the location of the Far Eastern Committee of that Administration.

Security and Defense

13. The two Governments agree that within the framework of a general system of world security a regional zone of defense comprising the Southwest and South Pacific areas shall be established and that this zone should be based on Australia and New Zealand, stretching through the arc of islands north and northeast of Australia to Western Samoa and the Cook Islands.

14. The two Governments regard it as a matter of cardinal importance that they should both be associated not only in the membership but also on the planning and establishment of the general international organization referred to in the Moscow declaration of October 1843, which organization is based on the principle of the sovereign equality of all peace-loving States and open to membership by all such States large or small for the maintenance of international peace and security.

15. Pending the re-establishment of law and order and the inauguration of a system of general security the two Governments hereby declare their vital interest in the action on behalf of the community of nations contemplated in Article V of the Moscow Declaration of October 1843. For that purpose it is agreed that it would be proper for Australia and New Zealand to assume full responsibility for policing or sharing in policing such areas in the Southwest and South Pacific as may from time to time be agreed upon.

16. The two Governments accept as a recognized principle of international practice that the construction and use in time of war by any power of naval, military or air installation in any territory under the sovereignty or control of another power does not in itself afford any basis for territorial claims or rights of sovereignty or control after the conclusion of hostilities.

Civil Aviation

17. The two Governments agree that the regulation of all air transport services should be subject to the terms of a convention which will supersede the convention relating to the regulation of aerial navigation.

18. The two Governments declare that the air services using the international air trunk routes should be operated by an international air transport authority.

19. The two Governments support the principles that

(*a*) Full control of the international air trunk routes and the ownership of all aircraft and ancillary equipment should be vested in the international air transport authority, and

(*b*) the international air trunk routes should themselves be specified in the international agreement referred to in the next succeeding clause.

20. The two Governments agree that the creation of the international air transport authority should be effected by an international agreement.

21. Within the framework of the system set up under any such international agreement, the two Governments support

(*a*) the right of each country to conduct all air transport services within its own national jurisdiction including its own contiguous territories, subject only to agreed international requirements regarding safety facilities, landing and transit rights for international services and exchange of mails.

(*b*) the right of Australia and New Zealand to utilize to the fullest extent their productive capacity in respect of aircraft and raw materials for the production of aircraft.

(*c*) the right of Australia and New Zealand to use a fair proportion of their own personnel, agencies and materials in operating and maintaining international airtrunk routes.

22. In the event of failure to obtain a satisfactory international agreement to establish and govern the use of international air trunk routes, the two Governments will support a system of air trunk routes controlled and operated by Governments of the British Commonwealth of Nations under Government ownership.

23. The two Governments will act jointly in support of the above-mentioned principles with respect to civil aviation, and each will inform the other of its existing interests and commitments as a basis of advancing the policy herein agreed upon.

Dependencies and Territories

24. Following the procedure adopted at the conference which has just concluded the two Governments will regularly exchange information and views in regard to all developments in or affecting the islands of the Pacific.

25. The two Governments take note of the intention of the Australian Government to resume administration at the earliest possible moment of those parts of its territories which have not yet been reoccupied.

26. The two Governments declare that the interim administration and ultimate disposal of enemy territories in the Pacific is of vital importance to Australia and New Zealand, and that any such disposal should be effected only with their agreement and as part of a general Pacific settlement.

27. The two Governments declare that no change in the sovereignty or system of control of any of the islands of the Pacific should be effected except as a result of an agreement to which they are parties or in the terms of which they have both concurred.

Welfare and Advancement of Native Peoples of the Pacific

28. The two Governments declare that in applying the principles of the Atlantic Charter to the Pacific, the doctrine of trusteeship (already applicable in the case of the mandated territories of which the two Governments are

mandatory powers) is applicable in broad principle to all colonial territories in the Pacific and elsewhere, and that the main purpose of the trust is the welfare of the native peoples and their social, economic and political development.

29. The two Governments agree that the future of the various territories of the Pacific and the welfare of their inhabitants cannot be successfully promoted without a greater measure of collaboration between the numerous authorities concerned in their control, and that such collaboration is particularly desirable in regard to health services and communications, matters of native education, anthropological investigation, assistance in native production and material development generally.

30. The two Governments agree to promote the establishment at the earliest possible date of a regional organization with advisory powers which could be called the South Sea Regional Commission, and to which in addition to representatives of Australia and New Zealand, there might be accredited representatives of the Governments of the United Kingdom and the United States of America, and of the French Committee of Nationl Liberation.

31. The two Governments agree that it shall be the function of such South Seas Regional Commission as may be established to secure a common policy on social, economic and political development, directed towards the advancement and well-being of the native peoples themselves, and in particular, the Commission shall:

(*a*) recommend arrangements for the participation of natives in administration in increasing measure with a view to promoting the ultimate attainment of self-government in the form most suited to the circumstances of the native peoples concerned;

(*b*) recommend arrangements for material development, including production, finance, communications and marketing;

(*c*) recommend arrangements for coördination of health and medical services and education;

(*d*) recommend arrangements for maintenance and improvement of standards of native welfare in regard to labor conditions and social services;

(*e*) recommend arrangements for collaboration in economic, social, medical and anthropological research;

(*f*) make and publish periodical reviews of progress towards development of self-governing institutions in the islands of the Pacific and in the improvement of standards of living conditions, of work, education, health and general welfare.

Migration

32. In the peace settlement or other negotiations the two Governments will accord one another full support in maintaining the accepted principle

that every Government has the right to control immigration and emigration in regard to all territories within its jurisdiction.

33. The two Governments will collaborate, exchange full information, and render full assistance to one another in all matters concerning migration to their respective territories.

International Conferences Relating to the Southwest and South Pacific

34. The two Governments agree that as soon as practicable, there should be a frank exchange of views on the problems of security, postwar development and native welfare between properly accredited representatives of the Governments with existing territorial interests in the Southwest Pacific area or in the South Pacific area or in both, namely, in addition to the two Governments, His Majesty's Government in the United Kingdom, the Government of the United States of America, the Government of the Netherlands, the French Committee of National Liberation and the Government of Portugal, and His Majesty's Government in the Commonwealth of Australia should take the necessary steps to call a conference of the Governments concerned.

Permanent Machinery for Collaboration and Coöperation Between Australia and New Zealand

35. The two Governments agree that

(*a*) Their coöperation for defense should be developed by
  (i) Continuous consultation in all defense matters of mutual interest;
  (ii) The organization, equipment, training and exercising of the armed forces under a common doctrine;
  (iii) Joint planning;
  (iv) Interchange of staff; and,
  (v) The coördination of policy for the production of munitions, aircraft and supply items and for shipping to ensure the greatest possible degree of mutual aid consistent with the maintenance of the policy of self-sufficiency on local production;

(*b*) Collaboration in external policy on all matters affecting the peace, welfare and good government of the Pacific should be secured through the exchange of information and frequent Ministerial consultation;

(*c*) The development of commerce between Australia and New Zealand and their industrial development should be pursued by consultation and in agreed cases by joint planning;

(*d*) There should be coöperation in achieving full employment in Australia and New Zealand and the highest standards of social security both within their borders and throughout the islands of the Pacific and other territories for which they are responsible;

(*e*) There should be coöperation in encouraging missionary work and all other activities directed towards the improvement of the welfare of the native peoples in the islands and territories of the Pacific.

36. The two Governments declare their desire to have the adherence to the objectives set out in the last preceding clause of any other Government having or controlling territories in the Pacific.

37. The two Governments agree that the methods to be used for carrying out the provisions of Clause 35 of this agreement and of other provisions of this agreement shall be consultation, exchange of information and where applicable joint planning. They further agree that such methods shall include

(*a*) Conferences of Ministers of State to be held alternately in Canberra and Wellington, it being the aim of the two Governments that these conferences be held at least twice a year;
(*b*) conferences of departmental officers and technical experts;
(*c*) meeting of standing inter-governmental committees on such subjects as are agreed to by the two Governments;
(*d*) the fullest use of the status and functions of the High Commissioner of the Commonwealth of Australia in New Zealand and the High Commissioner of the Dominion of New Zealand in Australia;
(*e*) regular exchange of information;
(*f*) exchange of officers; and
(*g*) the development of institutions in either country to serve the common purposes of both.

Permanent Secretariat

38. In order to ensure continuous collaboration on the lines set out in this agreement, and to facilitate the carrying out of the duties and functions involved, the two Governments agree that a permanent secretariat shall be established in Australia and New Zealand.

39. The Secretariat shall be known as the Australian-New Zealand Affairs Secretariat, and shall consist of a Secretariat of the like name to be set up in Australia and a Secretariat of the like name to be set up in New Zealand, each under the controller of the Ministry of External Affairs in the country concerned.

40. The functions of the secretariat shall be:

(*a*) To take the initiative in ensuring that effect is given to the provisions of this agreement;
(*b*) To make arrangements as the occasion arises for the holding of conferences or meetings;
(*c*) To carry out the directions of those conferences in regard to further consultation, exchange of information or the examination of particular questions;

(*d*) To coördinate all forms of collaboration between the two Governments;

(*e*) To raise for joint discussion and action such other matters as may seem from day to day to require attention by the two Governments, and

(*f*) generally to provide for more frequent and regular exchanges of information and views, these exchanges between the two Governments to take place normally through the respective High Commissioners.

41. His Majesty's Government in the Commonwealth of Australia and His Majesty's Government in the Dominion of New Zealand each shall nominate an officer or officers from the staff of their respective High Commissioners to act in closest collaboration with the Secretariat in which they shall be accorded full access to all relevant sources of information.

42. In each country the Minister of State for External Affairs and the resident High Commissioner shall have joint responsibility for the effective functioning of the Secretariat.

Ratification and Title of Agreement

43. This agreement is subject to ratification by the respective Governments, and shall come into force as soon as both Governments have ratified the agreement and have notified each other accordingly. It is intended that such notification will take place as soon as possible after the signing of this agreement.

44. This agreement shall be known as the Australian-New Zealand Agreement 1944.

Dated this 21st day of January One Thousand Nine Hundred and Forty Four.

Signed on behalf of His Majesty's Government in the Dominion of New Zealand.

Signed on behalf of His Majesty's Government in the Commonwealth of Australia.

Australian News and Information Bureau

VATICAN CITY

DECLARATION OF CONTINUED NEUTRALITY OF THE HOLY SEE[1]

June 7, 1944

The Holy See from the very beginning of the present war has always maintained an attitude of strict impartiality in regards to the actual armed conflict, remaining outside and above purely material interests and the competitions of contending parties.

Conscious of its universal mission of peace and charity, the Holy See in the exercise of its spiritual ministry left nothing undone to prevent the outbreak of the war not only through its intense diplomatic activity directed to this end, but also by solemnly recalling to all nations the eternal and unchanging principles of the moral teachings of Jesus Christ on the basis of which it would not have been difficult to have avoided the conflict and to have found a peaceful solution for the international controversies involved.

With the outbreak of this terrible war, which before long spread to all continents, the Holy See employed every means at its disposal to bring relief to all peoples without distinction of nationality or race, from the miseries and sufferings consequent upon the war, seeking to render the conflict less inhuman.

Outstanding were its endeavors to induce the belligerents to spare unarmed, civil populations and the great monuments of faith and civilization; to bring succor to the injured and to the prisoners, and in short to carry out its universal work of charity rendered the more necessary as the consequences of the military operations became more harmful and destructive.

It is the avowed policy of the Holy See to maintain unchanged this attitude of neutrality whoever may be the military authorities actually having control of the City of Rome and it has every confidence that it will be able to continue its spiritual activity in the world through regular and free contacts with its representatives in the various nations and with the Episcopacy of the Catholic Church in every country.

It is likewise expected that the efforts of the Holy See to relieve every human misery will suffer no obstruction in their continued development.

The Holy See furthermore, while rendering due thanks to Almighty God that the Eternal City was spared from the horrors of a war fought within its walls and in the midst of its ancient and monumental Basilicas and incomparable religious, cultural and artistic treasures, unites itself to the tribute of praise which all men of upright sentiments and good will must acknowledge for what has been accomplished in avoiding an irreparable loss for the entire human civilization, and this recognition of the highest values of the spirit which has been evidenced in the respect shown for the City of Rome, gives reason to hope that when at last hostilities have ended, peoples and their leaders will be prepared to establish an enduring peace which must be built upon the law of the Gospels, that is upon principles of charity, justice and Christian fraternity applied without distinction to all peoples and all nations.

[1] Statement read to the representatives of the press in Vatican City by Very Rev. Joseph F. McGeough in the presence of Right Rev. Walter S. Carroll, attached to the Papal Secretariat of State, and received by radio from Burke Walsh, N.C.W.C. News Service War Correspondent in Rome. June 7. 1944.

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INTERNATIONAL BOUNDARIES *

By the late JESSE S. REEVES
Sometime Member of the Board of Editors

This evening I am asking you to consider with me for a while the subject of international boundaries, which, by a process involving many forces, has come to have a very important position in international law. Ratzel, the great German authority in the field of political geography, said that "the mathematical precision of boundaries is a special characteristic of higher civilization; the progress of geodesy and cartography have permitted the making in Europe of political boundaries as well as geographical abstractions." [1] I employ the term "boundary" rather than the term "frontier," for "frontier" is used in two senses: one, that of the boundary; the other, that of the zone, narrower or wider, where one state ends and another begins, in which sometimes the exact limit of that frontier has never been exactly fixed. In Europe, ordinarily, the modern concept of frontier comprises both of these ideas. The boundary line, and a zone of some sort immediately adjacent to it, has its own peculiar combinations of responsibilities and of rights. In this country, we have not ordinarily used the term "frontier" to mean the international boundary. Here we have used the term "frontier" as referring rather to that fringe of settlement beyond which was the wilderness, or the unsettled Indian country. And, in that sense, the frontier passed westward from the Alleghenies onward to the Pacific. There is now no longer any frontier. With us, the frontier is rather a social than a political phenomenon and, as such, has given rise to an important school of American historians, the founder of which was the late Professor F. J. Turner and whose most distinguished exponent at the present time is Professor Paxson, now of the University of California. I prefer to use the term "boundary," the international boundary, so as to eliminate the less precise term "frontier."

There are only a few works on the frontier from the point of view of international law. The most recent is the work by Mr. Paul de Lapradelle.[2] In that work, the frontier as a zone, with its special responsibilities, and its special rights, is stressed rather than the boundary line proper, although

* Lecture delivered before the Summer Session on International Law, University of Michigan, July 25, 1938, and at McGill University, Montreal, August 28, 1939. Printed by permission of the author's family.

[1] F. Ratzel, *Anthropogeographie*, Pt. I (1899), p. 267, quoted by Nys, *Le Droit International*, Brussels, 1904, Vol. 1, pp. 420–421.

[2] *La frontière*, Paris, 1928. See also National Frontiers in Relation to International Law, by Vittorio Adami, translated by Lt.-Col. T. T. Behrens, London, 1927; Political Frontiers and Boundary Making by Col. Sir Thomas H. Holdich, London, 1916.

the author recognizes that the delimitation of the frontier, or the delimitation of the boundary line, which is an important topic in international law, is but one topic in any complete study of the subject.

It is the historical development of the international boundary in Europe and the qualities which international boundaries came to have in this Western Hemisphere, and particularly in North America, which we are to review.

I find the first description of the fixation on the spot of an international boundary line in Pausanias. In his *Description of Greece*, of the second century A.D., Pausanias says that Theseus erected a column between the Peloponnesus and Attica which bore on one side the inscription "This is not the Peloponnesus, but Ionia" while on the other side it read "This is the Peloponnesus, and not Ionia." [3] The Romans used monuments for the purpose of marking boundaries and there are many remains of the inscriptions upon such monuments. But the Romans were not greatly concerned with international boundaries. The Roman boundaries were mostly the divisions of the Roman provinces or of smaller governmental or administrative units of the Empire (dioceses). This Greek monument, however, marked an international boundary, an international boundary within the world of Greek states. The Romans, taking the idea from private property and the exact knowledge necessary of the confines of a private holding of land, carried the idea further with reference to larger units. Of course, in the Old Testament we see that he who removed boundary stones was accursed. "Thou shalt not remove thy neighbor's landmark, which they of old time have set in thine inheritance, which thou shalt inherit in the land that the Lord thy God giveth thee to possess it." [4]

The idea of private property in land, the necessity of knowing the exact point where the *meum* ends and the *tuum* begins, the same idea of some supernatural penalty or sacrifice against him who would tamper with the boundary stones, was applied, under the Roman system, with reference to all boundaries or limits, beginning, of course, with the boundaries of land in private ownership. The Romans developed the idea into a cult, the worship of the god Terminus. And Ovid, in the *Fasti*, describes the festival yearly celebrated in honor of the god Terminus, the god of boundaries; we see that in the description the boundaries were marked with blood.

> When the night shall have passed away, let the God, who by his landmark divides the fields, be worshipped with the accustomed honours. Terminus, whether thou art a stone, or whether a stock sunk deep in the field by the ancients, yet even in this form thou dost possess divinity. Thee the two owners of the fields crown with chaplets from their opposite sides, and present with two garlands and two cakes. An altar is erected; to this the female peasant herself brings in a broken pan the fire taken from the burning hearths. An old man cuts up the

[3] Quoted by de Lapradelle, work cited, p. 14, n.

[4] Deut. XIX, 14.

firewood, and piles it on high when chopped, and strives hard to drive the branches into the resisting ground. While he is exciting the kindling blaze with dried bark, a boy stands by and holds in his hand a broad basket. Out of this, when he has thrice thrown the produce of the earth into the midst of the flames, his little daughter offers the sliced honeycombs. Others hold wine; a portion of each thing is thrown into the fire; the crowd, all arrayed in white, look on, and maintain religious silence. The common landmark also is sprinkled with the blood of a slain lamb; he makes, too, no complaint when a sucking-pig is offered to him. The neighbours meet in supplication, and they celebrate the feast and sing thy praises, holy Terminus. It is thou that dost set the limits to nations, and cities, and mighty kingdoms; without thee all the country would be steeped in litigation. In thee there is no ambition—by no gold art thou bribed; mayst thou with law and integrity preserve the fields committed to thy care. Hadst thou in times of old marked out the land of Thyrea, then three hundred persons would not have been consigned to death, and then the name of Othryades would not have been read on the piled-up armour. Ah! how much of his blood did he expend in his country's cause! What, too, happened when the new Capitol was building? This, namely, that the whole multitude of Divinities withdrew and gave place to Jupiter. Terminus, as the ancients tell, being there found, remained in his shrine, and still possesses the temple in common with mighty Jove. Now, too, that he may see nothing but the stars above him, the roof of his temple has a little opening. After that circumstance, Terminus, no inconstancy was permitted thee; in whatever situation thou hast been placed, there abide, and do not yield one jot to any neighbour asking thee; that thou mayst not appear to favour a mortal rather than Jove. And whether thou shalt be struck by the ploughshares, or whether by the harrows, cry aloud, "This is my field, that is yours." There is a road which leads the citizens to the fields of the Laurentines, realms once sought by the Dardanian chief. On that road, the sixth mile-stone from the city is accustomed to witness the sacrifices made to thee, O Terminus, with the entrails of a sheep. To other nations, land has been allotted with some fixed limits; the extent of the Roman City and of the earth is the same.[5]

Thus the Roman empire had no problem of the international boundary. But the many Roman Provinces, Imperial and Senatorial, had boundaries definitely understood if not marked.

Plutarch, in a passage which was later quoted by Grotius, reports Pompey's reply to Phraates the Parthian, who had demanded that the Euphrates be adopted as a boundary between his empire and that of the Romans, to the effect that "as for a boundary, the just one would be adopted." And Grotius comments:

> 24. That same Pompey, whom I just now quoted for the opposite view, corrected the statement which a king of Sparta had made, that that state is the most fortunate whose boundaries are fixed by spear

[5] The Fasti, Tristia, Pontic Epistles, Ibis, and Halieuticon of Ovid, translated by Henry T. Riley, London, 1851, pp. 75–77.

and sword; he declared that that state is truly fortunate which has justice for its boundary line. On this point he might have invoked the authority of another king of Sparta, who gave the preference to justice over bravery in war, using this argument, that bravery ought to be directed by a kind of justice, but if all men were just they would have no need for bravery in war.[6]

When we come to the Middle Ages we have an altogether different situation. This was the product of that series of personal relationships, together with land holding as a basis for personal service, which we call the feudal system. This is illustrated by the following texts:

6. Following this disposition of an authority which it has pleased us to declare and order among our sons because of the peace which we desire to continue permanently among them (we have decreed) that none of them should presume to invade the limits or boundaries of his brother, nor fraudulently enter in order to overthrow his kingship or to reduce his marches, but should aid his brother and each of them and assist him against his enemies in accordance with reason and ability either within the country or against foreign nations.[7]

14. If a cause or an intent of such controversy between the parts should have arisen on account of the boundaries and confines of the kingdoms, which cannot be declared or determined by the testimony of men, then we desire that for the judgment of the doubtful matter, by the standard of the Cross, the will of God and the truth of the matter be inquired into and that never in any such controversy shall it be decided to disturb the boundaries by combat or battle.[8]

Unfortunately the text of the Treaty of Verdun, of 843 A.D., by which the Carolingian Empire was divided into three great historic parts, has not been preserved for us. There were frontiers, rather than boundaries, in the sense to which Ratzel made references. There was frequently a marginal area which is the "border" rather than the boundary—the mark, one of which, the mark Brandenburg, was the starting point from which the Hohenzollerns proceeded to turn the course of history and which led to the development of Prussia. There was the Markgraf, the Margrave, or Count of the Marches, whose business it was to protect the frontier from hostile incursions. There were the Welsh Marches, and in the title of a famous British regiment is preserved the function of these earlier Marches—the King's own Scottish Borderers.

Here and there a great natural feature, usually a river, was accepted as a boundary line, as the River Tweed between Scotland and England, but in general the boundary of the Continental European kingdom was that made by the limits of the units of local government, the city, the commune, or of the lands of fiefs, rising in hierarchy to the King.

At the beginning of the ninth century, Leo the Armenian, Emperor of

[6] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres, Prolegomena*, par. 24.

[7] First Capitulary of Charlemagne, 806 A.D.; translated from de Lapradelle, p. 29, n. 1.

[8] Louis le Débonnaire's Will, 837 A.D.; same, n. 2.

the East, undertook to determine the frontier of Dalmatia by means of a conference of delegates which settled both the international problems and the litigation of individuals.[9] In 1312 A.D. Philip le Bel appointed three commissioners to determine the boundaries of the territories of Flanders and Hainault.[10] And in 1490 A.D. an inquest on the boundaries of Lorraine was ordered by the Council of France. It consisted in an inquiry as to the earlier boundaries at the Meuse.[11]

I am able to find no treaty in Europe involving the cession of territory, or the perfection of title as the result of a war, in which a boundary—an international boundary line—is definitely set forth by a series of "metes and bounds" until the Treaty of the Pyrenees in 1659, between Spain and France. The idea of a conventional boundary line thus set forth with the accuracy of a deed transferring private property in land follows rather than precedes the establishment of the modern territorial state. It is in theory more than a coincidence. We refer generally to the establishment of the modern state system in 1648, by the Peace of Westphalia. How, then, during the whole period of the development of Western Europe, were boundaries determined? They were determined to some extent, no doubt, on the basis of lands held, directly or indirectly, of the crown who was concerned in the extent and area of the territory, in part patrimonial and in part feudal. Secondly, the land comprised within a commune or city was well known. The bishop knew what were the parishes of his diocese. When we turn to many of the treaties, we see that instead of running the boundary line by metes and bounds, from one landmark to another, the provision frequently stated that communes A, B, C, and D were to be a part, let us say, of State X; whereas communes H, I, J, K, and L were to be a part of State Y. Nothing was better known than the exact limits of each of the communes. A village community or a manor has an area around it; before one got beyond and into the forest into which one might be outlawed, there was the mark. And the mark was well defined. In England the parish was well defined. You may not be able to find a treaty between England and Scotland that will give you an exact dividing line between those two kingdoms, yet one would have had no difficulty in ascertaining, at any one time, whether he were in England or in Scotland. There was no difficulty in knowing which parishes were in England; when one passed beyond those parishes one was no longer in England but in Scotland. And, as we know, the boundaries of parishes were not allowed to be forgotten. In Easter week, or at some other time, it was the custom for the vestrymen of the parish to see to it that someone beat the bounds of the parish. It was known exactly, therefore, prescriptively, and on the basis of transmitted tradition, where the memory of man literally ran not to the contrary, what were the limits of the parish. In New England, where towns are geographical as well

[9] M. R. Vesnitch, cited by Nys, p. 420.

[10] R. de Maulde-la-Clavière, cited by Nys, p. 420.

[11] The same.

as political units, it was likewise customary to observe the annual rite, brought from England, of beating the bounds of the town.

Passing beyond the local unit, it is well known that as soon as a centralized and royal authority had developed, royal authority saw to it that the confines of the kingdom—the frontier—were protected. Charlemagne had a special set of men whose business it was to look after the frontier, so-called *missi dominici*. The frontier was not always necessarily coterminus with the frontier of another nation. Here there was some resemblance to the social frontiers of America. That zone was the margin, or the mark, and hence we have the markgraf and the margrave who looked after the frontier.

Not until 1795 do we find the difficulties that arose with reference to the Treaty of the Pyrenees worked out in modern fashion. The Treaty of the Pyrenees stated: "The Pyrenees mountains, which anciently divided the Gauls from the Spains, shall make henceforth the division of the two kingdoms [of France and Spain]. . . . And in order to agree upon the said division, there shall be appointed commissioners of both parties, who, acting together in good faith, shall declare what are the Pyrenees mountains which properly should divide in the future the two kingdoms, and they shall specify the boundaries which they ought to have." It was also agreed that the crest of the mountains forming the watersheds between France and Spain should be the boundary line between the two countries. We have passed from the Pyrenees Mountains as a mass to a line of the watershed.

To summarize, therefore, the early history of boundaries in Europe, we have what may be called the prescriptive limits of various units, and these units are unified into national states with known boundaries, or transferred by treaty as units from state to state. It is a later development that the juristic concept is adopted of a boundary definitely set forth as an article of a treaty.

Along with this development went the prosecution of national policies so as to obtain boundaries which were defensive or strategic. For these some natural feature of separation was sought—certain mountains, or a river, as, for instance, in the treaties between Austria and the Ottoman Porte in 1695 and 1719, wherein certain rivers were adopted as the boundary lines between the two countries. Or the policy of a state might seek the strengthening of its national unity, and to this end the factors of territory, or of race, or of language, or of culture, or of economic self-sufficiency were, one or all, of great consequence. Such factors were carefully considered during the Peace Conference of Paris, when the experts sought to find the dividing lines between nationalities by reading and classifying the inscriptions upon the gravestones of village cemeteries.

In Europe, therefore, in the development of the nation-state, in territories where geographical information was accurate, the so-called "natural" frontier has had greatest significance. A term which in its narrow sense has reference to the great features of the surface of the earth and is primarily

strategic—for offense (as a salient) or for defense (as a barrier)—comes to be broadened out so as to include various factors making for national unity—sociological, economic, linguistic, or cultural. But whatever the European boundary may be, it is based upon prescription, tradition and local attachment, and a great mass of accurate geographical knowledge.

The period of discovery and of the acquisition of geographical knowledge of the world outside Europe and the Mediterranean area presented an altogether different picture.

In May of 1493, Pope Alexander VI, a Spaniard, issued the bull *Inter Cetera*, in which we find designated a line running from North to South, lands found and to be found to the West of which were to be under the sovereignty of Castile and Aragon. Prior Popes had made investitures of lands inside of Europe and investitures of lands outside of Europe. The probabilities are—although the matter is subject to very great dispute—that the legal theory of the right of the Pope to make investiture of lands came from the so-called Donation of Constantine, which was shown by one of the great scholars of the Renaissance, Lorenzo Valla, to have been a forgery. The second investiture,—and that indeed has also been challenged as to its authenticity,—was the bull *Laudabiliter* of the only English Pope, Adrian IV, who granted to Henry II the investiture of Ireland. Probably the first bull of a Pope making any investiture in favor of Portugal issued as early as the last quarter of the 12th century. In it the Pope gave a recognition of complete sovereignty to territories which the Portuguese crown had wrested from the Saracens—infidels whose lands had been conquered by a Christian prince.

The era of discovery, beginning with Henry the Navigator, introduced a new basis for the title to territory. Not conquest, but discovery of lands not belonging to any Christian prince, gave title when authorized by the Pope. A series of bulls granted rights of possession or sovereignty to Portugal over the lands which the Portuguese had been discovering down the West coast of Africa, around the Cape of Good Hope, and, beyond that Southern Ocean, even to the Indies (1456). After Columbus' return in February, 1493, there was issued, in May of that year, the bull of Alexander VI which set up the dividing line between the dominions of Portugal and of Spain, and an investiture of these two kingdoms. Possibly the bull is to be regarded not so much an investiture of Portugal as it was a limitation upon Portugal and a grant of rights to Spain. The line which was set up was not in all respects a line dividing territory according to our modern thought so much as it was a line setting forth what in our modern parlance would be called a sphere of influence, or a sphere of interest. The line indicated by the Pope was to be found by drawing a line from the Arctic pole to the Antarctic pole, the said line to be distant one hundred leagues toward the West and South of the Azores and the Cape Verde Islands. Beyond this line all lands not in the possession of any Christian prince,

"those discovered or to be discovered," were to be Spain's. Why one hundred leagues West of the Azores? It has been generally thought that the line was selected because Columbus found it to be a line in which there was no variation of the compass, according to his observation of September 13, 1492, and therefore it could very properly be used as a prime meridian and as the beginning towards the West of Spain's hemisphere of influence. Another theory accounting for the selection of a point one hundred leagues West of the Azores and Cape Verde Islands is that the Westernmost limit of the earth was at the Cape Verde or Fortunate Islands, according to the *Guide to Geography* of Ptolemy of Alexandria, which became known to the scholars of the 15th century only after thirteen centuries during which it was unknown to Western Europe.[12]

If, however, you should turn to the letter of Columbus after the voyage (the fourth) in which he had reached *terra firma* (that mainland which came to be known as the Spanish Main), and had seen the great Orinoco River coming down from the mountains and the fresh water lake, we find that Columbus had altogether different reasons for making a line a hundred leagues West of the Azores. And, while this was some years after the bull of Alexander VI, I think one can regard the letter as including information which Columbus had received on his first voyage and which he had amplified and verified upon his second and third voyages. He noticed, when he was one hundred leagues West of the Azores, a great change in the sky, and in the stars and in the temperature of the air, and in the water in the sea. He noticed that there was no variation of the compass. He noticed, again, that he had entered into water covered with a great quantity of weeds—the more or less mythical Sargasso Sea. On later voyages he discovered that as he went on further and further west and reached the mainland of South America the people were altogether different from those of Africa. They were more civilized, gentler, lighter colored, milder mannered. And then, "I have always read," he said, "that the world comprised of land and water was spherical, and the recorded experiences of Ptolemy and all others have proved this by the eclipses of the moon. . . . But I have now seen so much irregularity that I have come to another conclusion regarding the earth, namely, that it is not round, but of the form of a pear which is very round except where the stalk grows. . . . Now," he said, "when we get beyond the hundred leagues, we begin to go up, up, up smoothly towards the sky." He went up hill. Why? Because many writers have shown that the terrestrial paradise was in the East, the farthest place in the East beyond India, and paradise was a lofty place although terrestrial. And, as Genesis says, four rivers flow from paradise. Columbus was convinced, when he reached the *terra firma* of South America, that which is now Venezuela, that he had reached that portion in the other hemisphere, the most

[12] A Latin edition appeared in 1462, with maps; a Greek edition, edited by Erasmus, was printed in Basel in 1533.

Easterly part of which was paradise, and that the Orinoco was one of the four rivers flowing from the terrestrial paradise. And while he says "Neither I nor any human can attain entrance into this terrestrial paradise" he concludes in effect "the lands which surround it I have discovered and they, including Paradise, I now offer to you." This letter of Columbus came after the bull of the Pope, but I venture to think that these ideas, or the like of some of them held by Columbus, gave rise to the line which was to be drawn from the North pole to the South pole, one hundred leagues West of the Azores, for beyond that line there was a sea change into something rich and rare.

Now we know that Portugal in diplomatic contests with Spain was frequently very fortunate, just as Brazil in her diplomatic boundaries has been very fortunate with her Spanish-speaking neighbors. The next year after the issuance of the bull Spain and Portugal got together in the first treaty that has to do with the New World, the Treaty of Tordesillas, of 1494. In that treaty this line was moved 270 leagues further to the West, and by so moving the line to the West we have the interesting historical result that the people of the largest single political unit in South America speak Portuguese, for that 370 leagues West of the Azores cut across the eastern tip of South America from North to South. This Treaty of Tordesillas of 1494 may simply have moved the line and created two spheres or hemispheres of influence rather than vested titles to lands discovered or to be discovered. You may take one theory or you may take the other. Much may be argued on either side.

The Treaty of Tordesillas provided for a most extraordinary boundary commission. When you consider the geographical knowledge or lack of it at that time, 1494, and when you consider also how little scientific apparatus and method there existed, the character of the international boundary commission becomes no less than amazing. "In order that the said line may be made straight and as near as possible 370 leagues west of the Azores" the representatives of both the parties, within ten months immediately following the date of the treaty, were to meet upon the spot and mark the point 370 leagues West of the Azores. That determined, the joint commission should then draw the North and South line from the Arctic pole to the Antarctic pole. This in 1494, and the Arctic pole was not reached, nor the Antarctic pole, until the beginning of the 20th century! Nevertheless, by 1514 there was an artificial boundary circling the globe!

And now I venture to formulate the two main underlying propositions with reference to any so-called artificial or imaginary boundary line, meaning by that a boundary line of latitude or of longitude—and here is where American boundaries and their development depart from boundaries and their development in Europe. Wherever, on any map, you find a boundary line along a line of latitude or longitude, you may be sure that the boundary line was devised and agreed upon in the absence of accurate geographical

information with reference to the territory through which that boundary line passes. Not certain knowledge, as the Bull states, but certain ignorance! The straight line boundary based upon latitude and longitude never follows, but always precedes, geographical knowledge. Secondly, wherever you find a boundary line resting upon latitude or longitude, it has been fixed in advance of the movement of colonizing population, and that is the reason why North America and the United States have so many boundaries—international and State, and I might also say county and township, boundaries—of this kind. There never were four boundary lines so thoroughly artificial, probably, and creating quite such an artificial unit of government on a large scale as the boundary lines of the State of Colorado, admitted in 1876. The boundary line of Colorado incloses for the most part a mixture of territory ceded by Spain in 1819, once claimed by Texas from Mexico, part of it recognized as being a part of Texas, the rest a part of the Louisiana Purchase with watersheds running in various directions. It is a State with perfectly artificial limits. But once the lines had been cut out and Colorado was admitted into the Union as a State, sentiment is built, and "Colorado," a geographical parallelogram, becomes a "sovereign" State, with a State flower, a bird and a song, equal to each of the 37 which preceded it.

The first boundary agreement based upon a line of longitude passed around the globe and complicated questions of territorial sovereignty in the East. The United States and The Netherlands a few years ago arbitrated the question of sovereignty over Palmas Island, south of the Philippines. The chains of title go back ultimately to those of Spain and Portugal under the Treaty of Tordesillas of 1494. Because the line was adopted in advance of that "certain knowledge" which was in theory necessarily associated with "plenitude of power" interminable disputes arose and were settled, one of them only recently. The line dividing Alaska from Canada—the line of 141° W. Longitude—was agreed upon when but two points along it were known, namely, Mount St. Elias and the Frozen Ocean. The interior of that part of North America was unexplored when Canning in 1824, assisted by the Hudson's Bay Company, suggested this line to Russia.

We turn now to boundary lines of latitude. The first line of latitude used to delimit a sphere of influence seems to have emerged in the verbal agreement of Cateau Cambresis of 1559, in which a "line of amity" is set up—the Tropic of Cancer and the prime meridian line, all territory North and East of which was to be within the law. This line was extended to the equator by the Treaty of Madrid of 1630 between England and Spain. As far as I can ascertain, the first attempt to set up an artificial boundary line on the continent of North America appeared in a grant made by Henry IV of France to Du Monts in Acadia in 1603. There a line of latitude was to be the limits of the grant. "The countrie, territories, coasts, and confines of La Cade (Acadia), commencing with the fortieth degree unto the forty-sixth;

and within the said limits or any of them as far and to such distance as may be possible." [13]

We may compare this with the grant made by the British Crown to the Virginia Company, in 1607, of all the lands in that part of America "called Virginia, from the Point of Land called Cape or Point Comfort, all along the Sea Coast to the Northward, two hundred miles, and from the said Point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and Northwest; and also all the Islands lying within one hundred miles along the Coast of both Seas of the Precinct aforesaid; . . ." [14] And in the grant to the Massachusetts Bay Colony, 1620, the lines of latitude were definite: "from Fourty Degrees of Northerly Latitude, from the Equnoctiall Line to Fourty-eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Maine Land, from Sea to Sea, with all the Seas, rivers, Islands, Creekes, Inletts, Ports, and Havens, within the Degrees, Precincts, and Limitts of the said Latitude and Longitude, shall be the Limitts, and Bounds, and Precincts of the second Collony." [15]

The oldest part of our boundary, which is an artificial boundary, is the line of 45° N. Lat. from the St. Lawrence to Lake Champlain. That was not originally an international boundary. And let me say that there was not a single treaty having to do with cessions in North America which set out an exact boundary line until the Treaty of Peace between the United States and Great Britain of 1782–83. Not one! The United States and Great Britain in that treaty adopted a new method; it was a lawyer-like description of a line. The 45° line between the St. Lawrence and Lake Champlain had been adopted after 1763 and before the Revolution as the Southern limit of Quebec. The American commissioners at Paris, rejecting Franklin's arguments for the cession of Quebec, sought a boundary line on the basis of the limits of the thirteen colonies and the lands to which they were entitled as far West as the Mississippi. The line of 45° from the Connecticut River to the St. Lawrence, as set forth in the Peace Treaty of 1783, was the first boundary line of latitude in any international agreement. To this must be added a portion of the Southern boundary. Not until 1818 do we have another astronomical boundary, when we agreed with Great Britain that the boundary of the Northwestern part of the United States from the Lake of the Woods to the Rocky Mountains should be the 49th parallel. Thomas Jefferson was the first American expansionist, and Thomas Jefferson thought that the line of 49° had been agreed upon as the line between the British Hudson's Bay and French Canada by com-

[13] Lescarbot, *Histoire de la Nouvelle France*, Paris, 1609; English trans. by W. L. Grant, Toronto, 1907, Vol. II, pp. 212, 490.

[14] The Federal and State Constitutions, p. 3795.

[15] The same, p. 1829.

missioners between France and Great Britain after the Peace of Ghent in 1713. But Thomas Jefferson had studied certain rather tendencious maps that appeared shortly before the beginning of the Seven Years' War. Our 49th parallel, which was extended to the Rocky Mountains in 1818, is a purely imaginary line, of course, based upon an utter misconception, because no such agreement had ever been made. It was desired by Great Britain as early as 1697, but never admitted by France. In 1846 the United States and Great Britain agreed to project the line of 49° to the Pacific. It is the longest boundary line of latitude in the world. Professor Nys has remarked in substance that wherever one finds this kind of a boundary line, one of latitude or of longitude, it is merely a provisional line and that it is apt to be changed in the course of time. A most extraordinary statement. Our line of 49° created a new kind of boundary line and a new kind of international relationship.

The boundary lines of Europe were based on knowledge. Ours was not. Such a line, agreed upon when the territory was unexplored, excludes all considerations of strategy, of natural features, or of economic unity. It would be impossible to fortify the line of 49°, a straight line running west nearly 2,000 miles. When you add to that the agreement with Great Britain that the Great Lakes should not have naval armaments, we really have a new order of the ages. Beginning with the line of 45° adopted in our treaty of peace of 1783, followed by our arrangement with Great Britain of 1817 concerning the Great Lakes, and the treaties of 1818 and 1846, we have what Grotius had in mind—a boundary not determined by the sword, but a boundary based upon justice, one over which war can hardly be waged, one that rises superior to all theories of strategy and of armament.

In 1825 Great Britain and Russia had concluded a treaty with reference to the limits between Alaska and British America. In that treaty the line of the 141st parallel was adopted from the summit of Mount St. Elias North into the Frozen Ocean. In 1867 Russia transferred Alaska to the United States within the same boundary, and that line of the 141st parallel is the longest longitude boundary in the world. Like the line of 49°, it is one that rises superior to all theories of strategy and armament.

This imaginary line as finally delimited is a product of a refined and higher civilization. The line has no width but length only. It becomes, therefore, more and more necessary, as countries are peopled up to the boundary, that the assistance of the engineer and of others be had for the most accurate determination of the boundary line. And now in the past twenty-five or thirty years, we have had a resurvey of the boundary line from the St. Croix River in Maine to Puget Sound in the West, and for the part on land a series of intervisible monuments. On the top of each of those monuments there is a bench mark, in which the latitude is corrected to the very small fraction of an inch. This could not be done until science was able exactly to measure latitude. When we come to longitude, there were still

greater difficulties. During the period of discovery the maps became fairly accurate as to latitude and very erroneous as to longitude, because the accurate determination of longitude requires accuracy in the measurement of time. Not until the development of wireless telegraphy has it been possible to measure with the necessary exactness a line of longitude. Mr. Green, the late Astronomer Royal of Canada, who was on the Canadian-American commission which worked out the boundary of the 141st meridian, told me that early in August, 1914, he was directing a party making a survey of the North-South line between, I believe, Saskatchewan and Manitoba. He was away off in the North in the early days of August running a line of boundary exactly North, far from railroad, telegraph or telephone; and on one warm August afternoon, as he was getting his time signals from Ottawa, the signals ceased. There came in Morse Code over the wireless "England is at war with Germany." So it is not difficult to fix the use of wireless in determining longitude, for he was the first to use it in determining such a boundary line. In North America there has been the greatest use of the artificial boundary line. It was adopted in Australia. To a less extent it has been used since 1876 in Africa. Such lines do not appear upon the map of Asia. You rarely find them in South America. Other elements have entered in Asia, for there European states have not acquired territory by discovery and occupation. In South America, for the most part, the boundary lines are based upon the so-called *uti possidetis* of 1810. But the boundary line of justice that takes no account of strategy, or terrain, or the possibilities of armament—the boundary line that does not have as its major premise the principle of security, is the boundary line which was adopted at the close of the Revolutionary War between commissioners of Great Britain and the United States in ignorance of geography, and again in 1846, in ignorance of geography. And so we may say, with reference to the boundary line of justice, that we are to be congratulated that our forebears knew so little about the strategic possibilities of the Great Lakes and that the lands of the West were yet unexplored, and that they made a boundary line in utter lack of knowledge, for in Europe security based on knowledge was the major premise of a boundary line; it was the major premise of the boundary line of 1919. We have, then, good reason to be thankful for the ignorance of our forefathers. If we have the god Terminus in mind, we may repeat with Emeric Crucé [1623]: "Bound your territories after the manner of Numa, and, following his ordinance, let us sacrifice to the god Terminus without effusion of blood." [16]

[16] Quoted by de Lapradelle, *op. cit.*, p. 40.

INTERNATIONAL LAW IN TURKEY

By Cemil Bilsel *

Former Rector of the University of Istanbul

An editorial on the Turkish Institute of International Law by Professor Philip Marshall Brown, President of the American Peace Society, appeared in the October 1943 issue of this Journal. I had the pleasure of publishing in the ULUS newspaper on the 23rd of February, 1944, a translation of this editorial, which contained the expression of many good wishes for our Institute no less than for Turkey itself and I was rewarded by seeing that it aroused great interest and profound gratification in learned and political circles in Turkey. Needless to say, this favorable comment on its inauguration and work, written by an authority in the most progressive country in the world, was recorded with deep gratitude and pride by our Institute.

Professor Philip Marshall Brown is one of the American authorities who know the Turks well and whose own name is well-known in Turkey. As I pointed out in the article which I had written to accompany the translation referred to above, President İsmet İnönü, in his capacity as Foreign Minister and chief Turkish delegate at the Lausanne Peace Conference, had not failed to cite Professor Brown's name in the course of the negotiations which took place there.

Our learned colleague began his editorial with the following words:

> The inauguration of the Turkish Institute of International Law on May 14, 1943, at the University of İstanbul, which stands in the shadow of the ancient church of Sancta Sophia near the site of the palace of Justinian the great lawgiver, is an event of dramatic significance.

Having pointed out that the speech made by the Turkish Minister for Foreign Affairs Numan Menemencioğlu on the occasion of the inauguration of our Institute was well worthy of special attention, and after quoting and summarizing several passages from this speech, the American professor went on to underline as follows the meaning which it was meant to convey:

> In its respect for the principle of *pacta sunt servanda* Turkey appealed to the signatories of the Lausanne conventions for the revision of the regime of the Straits rather than take arbitrary action as the sovereign power most interested in the Dardanelles and the Bosphorus. During the present war it has vigorously asserted the rights and the obligations of neutrality. . . . The Minister for Foreign Affairs had strong reasons for greeting with faith and enthusiasm the founding of the Institute of International Law. And the United Nations in their defence of law and order may well be grateful for this robust affirmation of faith in the supremacy of law. It is much more than a heartening gesture: it is

* Translated by L. Nezih Manyas.

> a timely rebuke to those defeatists who seem to have assumed that because of the cynical disregard of international law by a few nations it had become worthless and lifeless.

Pointing out that the founding of the Turkish Institute of International Law is a great challenge as well as an inspiration, Professor Brown says that:

> It serves to draw attention to the fact that the Republic of Turkey has not only attained a position of equality among the nations of the earth but has also attained a position of wise and powerful leadership. . . . It stands as a great bulwark for international law and order in a region where wars have raged for centuries.

He goes on to add:

> The amazing achievements of the Republic of Turkey both in the domestic and the international fields demonstrate most eloquently that only a people of sterling character could have accomplished so much in so brief a time. The Family of Nations has been greatly strengthened. The cause of law and order has received a great and needed impetus by the establishment of the Turkish Institute of International Law. The American Society of International Law cannot but feel gratified and look forward to a profitable collaboration in the high task of the development and reinforcement of the science of the law of nations.

We perceive in these words a pleasing and uplifting encouragement on the part of the United States of America which was the first to inoculate the world with thoughts of freedom and which is even now fighting for world liberty on a scale unrecorded in history. It is also a fact that all of those men, from Admiral Mark Bristol and Joseph C. Grew down to the present United States Ambassador, Mr. Laurence A. Steinhardt, who represented their great country in Turkey and whose names and memory we honor, and all those other figures of the diplomatic corps who worked with them and who are so well-known to us, have each brought us evidence of the same encouragement, To them we offer our heartfelt thanks.

Sancta Sophia, which Justinian built in the year 532 and dedicated to the cause of eternal learning, is today a museum. An American, Professor Thomas Whittemore, has been sparing no effort in his four years of enthusiastic work calculated to bring to light and restore all the pictures and mosaics contained in this ancient monument. As for the Capitolium, which occupied the site of the seat of learning inaugurated by the great lawgiver in A.D. 525, its place is now taken by the University of İstanbul and its various institutes.

As a matter of fact the story of the early days of the University of İstanbul dates even further back into ancient history. In a decree dated the 1st of March, A.D. 321, Constantine the Great had ruled that all teachers of medicine and of grammar should be exempt from taxes, and the regulations issued on the 12th of March, A.D. 370, had placed the universities of İs-

tanbul and of Rome on the same high level. In the year 425 the University of İstanbul was enlarged and re-organized on a grand scale, thus becoming entitled to be ranked amongst the oldest universities of the world.

Sultan Fatih Conqueror the Second, who captured and held İstanbul in 1453, following a feat of arms still extolled in history, established in İstanbul a "Klüliye," or university, comprising 16 colleges and one clinic, for the purpose of teaching theology, law, literature, science and medicine. At this university (founded in 1475) the teaching was conducted by the most learned men of those days in an atmosphere of freedom and independence equal almost to that which obtains in universities today. Later, Sultan Süleyman the Legislator founded a separate university composed of four large colleges and one clinic. Thus, at a time when the Ottoman Empire extended from the gates of Vienna to Central Africa and from the Adriatic to the Sea of Oman, science and learning with the Turks also attained its highest and most progressive level. It is recorded that in one case even Sultan Fatih the Conqueror failed to convince the learned professors of his day and had to relegate his own desires to the background in order to act in accordance with their ruling.

The only fault that can be found with the Turkish universities of those days lies in the fact that they omitted to resort to the aid that men of learning in the West could have extended them and so failed to establish contact and relations with the Western world.

In the days when the Ottoman Empire wasted and finally withered away science and learning also shared its fate. In fact the decline in learning was one of the primary causes of the decline and fall of the Empire.

When the leaders of the Tanzimat era had recourse to the West in their efforts to reform the state, they decided among other things to establish a modern university alongside the existing Medrese's (1844) and called in an architect from Italy to draw the plans for the new building. The University building, constructed by long years of labor under the direction of this Italian architect, was finally completed in 1863, but later was burned to the ground. The University, which had been opened in this building was, however, re-organized in 1908 and in 1933 was completely re-organized on international lines. Professors of world-wide renown were invited to occupy chairs in the various faculties; its institutes, laboratories, and libraries were endowed with the most modern of equipment; 18 new buildings were added; finally, the foundations have now been laid for the huge and imposing building which is being put up on the site of the Faculties of Science and of Literature previously burned down, a building destined to be the biggest and most beautiful edifice in modern İstanbul and designed to house some twenty institutes of learning.

It is a sad thought indeed that the Turkish nation, which owes to Turkish architects countless architectural treasures and mosques higher than Sancta Sophia, and with domes larger in diameter than that of this famous monu-

ment, should have declined to an extent which necessitated having recourse to the aid of an Italian architect. It was therefore with pardonable pride that, in laying the cornerstone of the new building, I underlined the fact that this edifice was the unaided work of two Turkish architects. This accomplishment could serve as an example to illustrate the successes which, as pointed out by Professor Brown, Turkey has squeezed into a mere twenty years.

This University of which I was Dean for over nine years and which comprises today 13 clinics and 40 institutes, 500 Turkish and foreign professors, lecturers and assistants, and over 11,000 students, has become one of the foremost seats of learning in the world. Among the foreign professors are Germans (non-Nazi), Englishmen, Frenchmen, Italians, Swiss, Hungarians, Dutch, and Yugoslavs, of whom some have become Turkish citizens and others have gone to the United States.[1] İsmet İnönü, the Chief Turkish Delegate to the Lausanne Conference, referred to by Professor Philip Marshall Brown, based all his demands there on international law and defended and carried his thesis of equality on the strength of the principles of international law. Indeed all our relations with other countries have been based on the same law, a fact which led our Foreign Minister, Numan Menemencioğlu, to point out that Turkey was not a country where international law merely took shelter but one in which it reigned supreme. It was in order to further the ends and aims of international law that our Institute was organized.

The Turkish Institute of International Law has started to work. Despite the fact that my election to the National Assembly as Deputy for Samsun necessitated my parting from the University, I delivered there a series of lectures on the shortcomings of international law. The courses this year were directed by ten Turkish and foreign professors and we are awaiting from the United States and England next year still other famous professors to expand and reinforce international law.

In broaching in his article the subject of the Straits, our learned colleague Professor Brown points out that Turkey appealed to the signatories of the Lausanne Conference for the revision of the regime of the Straits rather than take arbitrary action as the sovereign power most interested in the Dardanelles and the Bosphorus. What was the Lausanne regime? What is the situation today? I beg leave to devote a few lines to this question, which interests American circles closely, especially in view of the fact that the principle of restricted freedom of passage which forms the basis of the Treaties of Lausanne and of Montreux was the outcome of an American intervention.

The Turkish Straits are mentioned in about twenty conventions of his-

[1] The famous mathematician von Mises, the philsopher Reihenbach, the physicist Dember, the jurist Hönig, the surgeon Nissen. One of our valued professors, the economist Röpke, has gone to Switzerland.

torical importance between 1774 and 1921. Five independent treaties dealing solely with the Straits are those of 1841 (signed in London), 1856 (Paris), 1871 (London), 1923 (Lausanne) and 1936 (Montreux).

The old established principle applied to the Straits by the Ottoman Empire was one of undeviating prohibition of passage. At a time when the whole Black Sea area, including the Sea of Azak, the Straits, and the Sea of Marmora were surrounded by Turkish possessions, such a ruling was in conformity with international law, but it could no longer be applied when Russia definitely established herself on the Black Sea in 1774. Treaties were drawn up providing the right of passage for commercial vessels in time of peace and denying passage to warships. This regime remained in effect *de jure* until the Lausanne regime and *de facto* until the Armistice of Mondros of October 30, 1918.

This regime of keeping the Straits closed to warships was the outcome of trying to find the happy mean between the conflicting interests of different Powers. Russian warships were not allowed to sail in and out of the Straits, but, on the other hand, the fleets of other countries were prevented from entering the Black Sea in order to threaten Russian ships or the Russian coastline. That is to say, the warships of nations owning strong fleets (as typified by Great Britain) could not enter the Black Sea, but then neither could the Russian fleet come out by way of the Straits to threaten the Mediterranean or the sea route to India. This balance was maintained unchanged even after the Russo-British Agreement of 1906.

Both the closing of the Straits in World War I and their unconditional opening after the Armistice proved to be most disadvantageous for Russia, for British, French, and other warships took the Black Sea under their control and resorted to acts against that country.

At the Lausanne Conference of 1922–1923 Soviet Russia defended strongly a thesis in favor of absolute non-passage. According to Foreign Commissar Tchicherin, who represented Soviet Russia, in view of the fact that the Soviet Union had renounced the aims which Tsarist Russia had nursed concerning the Straits, there remained only two solutions possible, i.e., (1) to close the Straits to warships and recognize Turkish sovereignty, thus forming a buffer, or (2) to decide on some international formula which would carry to these parts every single point of difference and rivalry between the countries of the world. Tchicherin suggested that the non-passage formula, being upheld by various conventions, also had the advantage of conforming with international law.

Going to the point almost of transgressing the limits of his authority, the chief British delegate at Lausanne, Lord Curzon, suggested that the "non-passage" solution would merely result in turning the Black Sea into a Russian lake, and that the principle of free passage was the only one really in keeping with international law. Therefore, acting on behalf of the Allies, it was this latter alternative that he advocated most strongly. But it re-

mained an undeniable fact that an unrestricted right of passage would place the Black Sea under the control of the stronger sea powers.

At a moment when the discussions for and against unrestricted passage had almost reached a deadlock, the chief observer of the Special Mission of the United States of America, Richard Washburn Child, voiced an opinion which brought everyone face to face with reality. He said:

> This discussion involves freedom of all those nations which border on the Black Sea and of all those nations outside the Straits who desire to reach them on their friendly errands. . . . We cannot accept the position that the future of commerce in the Black Sea is the exclusive affair of the states bordering upon it. . . . The unlimited control of the Straits and the Black Sea by any one nation is against the policy of the world.[2]

Thus the chief American observer reached the following conclusion: warships should be allowed to enter wherever citizens and commercial vessels are allowed to enter, for warships had work of a protective nature to do even in peace time.

It then became clear that the suggestion to the effect that warships should be categorically denied passage could no longer be defended and even the Soviet Foreign Commissar drew up a project which envisaged exception being made in the case of small ships.

That was why the chief Turkish delegate agreed to a regime of partial right of passage. This regime was based on data pertaining to the various classes of warships and the total tonnage of the strongest fleet in the Black Sea: every State was at liberty to pass through the Straits at any time 3 warships of not more than 1,000 tons each; but the passage of ships over and above this number and tonnage was restricted by the relative strength of the strongest fleet in the Black Sea.[3]

According to this formula, the Black Sea was placed under the control neither of Russia nor, for example, of Great Britain, or of any other state, for it was possible for both countries to maintain equal forces on the spot. But no restriction had been agreed upon for belligerents in case of a conflict in which Turkey remained non-belligerent. Thus in the event of a war between Russia and Great Britain the whole British fleet could enter the Black Sea.

It was only natural that Russia should feel dissatisfied with this arrangement; and Russia did not apply the conditions of this Convention which, accepted because of the misguided insistence of Lord Curzon, failed to please Turkey either. Therefore this Convention, which Lord Curzon had de-

[2] [Papers Relating to the Foreign Relations of the United States, 1923, Vol. II, pp. 913–914.]

[3] [Text of the Convention in this JOURNAL, Vol. 18 (1924), Supplement, pp. 53–62 and in Manley O. Hudson (ed.), International Legislation, Washington, 1931, Vol. II, pp. 1028–1041.]

scribed as "a sacred and eternal page in the book of diplomacy," remained in force for less than 13 years; for, acting on the justified demand of Turkey, the whole question was reëxamined at Montreaux in 1936 and the Convention now in force was accepted for a term of 20 years.[4]

The restricted right of passage provided for in the Montreux Convention is one calculated to safeguard the security of Turkey and Russia while meeting the requirements of every other world power. In time of peace one set of restrictions is provided for the Straits and a different one for the Black Sea. Thus countries which do not possess a coastline on the Black Sea can only introduce into this sea a total tonnage of 45,000 tons of warships, with an additional 8,000 tons for humanitarian purposes. Such warships must be composed of light craft and can remain for a maximum of 21 days only. As for countries which do have a coastline on the Black Sea, warships belonging to them may pass through the Straits only one at a time and be accompanied by two torpedo-boats only.

Warships belonging to belligerent countries may not pass through the Straits in the event of a war in which Turkey does not participate except when ships are permitted to pass through (1) by decision of the League of Nations and/or (2) to aid, in accordance with the provisions of a Pact of Mutual Assistance, a country which has been subjected to aggression; this is the situation today.

Each of the states signatory to the Convention had expressed its satisfaction in this arrangement. In this connection we attach special importance to the words uttered by the Soviet Foreign Commissar, Maxim Litvinof, who, in representing at Montreux a country which had been dissatisfied with the former regime decided upon at Lausanne, emphasized the vital importance of the Straits from the Russian point of view and stated in unambiguous terms that he approved the new decision.

The Straits, which had been administered until the outbreak of the present war in this atmosphere of collective satisfaction, have attracted attention again more than once since 1939. Without going into details concerning the various rumors that have been circulated, I should like to place on record the following facts:

(1) In a Note which they handed to Turkey on the 13th of August, 1941, both Soviet Russia and Great Britain confirmed that they intended to respect the provisions of the Montreux Convention.[5]

(2) In a question which he put to British Prime Minister Churchill in the House of Commons on the 7th of May, 1941, Mr. David Lloyd George brought up the question of German ships having passed through the Straits in order to occupy Crete and the other Aegean Islands. The Prime Minister replied substantially as follows: "With regard to Turkey, I thank my

[4] [Text of the Convention of July 20, 1936, in this JOURNAL, Vol. 31 (1937), Supplement, pp. 1–18; also in Hudson, work cited, Vol. VII, pp. 386–404.]

[5] New York Times, August 13, 1941, p. 1, cols. 1–2.

right honorable friend for the great restraint with which he spoke about that country, whose relations are so highly valued by us and whose part to play in this great world conflict is one of the utmost importance . . . they (Turkey) have no right whatever to stop them." [6] Having read out the relevant clause from the Montreux Convention, Churchill went on to add:

> We believe that one of the ships which passed through the Straits was in fact used in the course of occupying the Islands; but the Germans and Italians also possess other ships that could have been used for this purpose. The question is one which centers round the interpretation to be placed on the Convention, and that is a matter which concerns Turkey.

It is a fact that the Montreux Convention stipulates that both in time of peace and in case of a war in which Turkey does not participate, all commercial vessels, irrespective of nationality or type of cargo, shall be accorded unhindered passage through the Straits. Therefore, in view of the provisions set forth with extreme clarity in Art. 4 of this Convention, Turkey was in no position to interfere.

It is of course a well-known fact that large convoys of supplies and war materials are sent to Russia today from England and the United States. Were these convoys to pass through the Straits, the voyage would be both shorter and easier; but Turkey is not the cause of their not being routed through the Straits, for Art. 4, referred to above, sanctions commercial vessels carrying all kinds of supplies and materials to Russia too. Therefore, if aid to Russia is not being sent by way of the Straits this is due solely to the facts that the Aegean Islands are occupied by the Germans and that ships destined for Russia are prevented from reaching the Straits. All of which goes to show that the question of the Straits forms one with those of the Aegean, the Mediterranean, and the entrances to them.

(3) The discussions which followed the passing through the Straits of the tankship *Tarsivid*, belonging to the Italian Navy, in the months of June and July, 1941, resulted in agreement between the Turkish and the British Governments as to the age limit of a ship during time of war.

(4) Again a German motorship, the *Zeefalke*, of 37 tons, not armed, sailing under a commercial flag and presenting regular documents, passed through the Straits, in the month of July, 1941; upon this occasion views were exchanged between the Turkish and Soviet Governments. Disagreement concerning the purport of international law appeared between the respective Governments concerning the use as warships of vessels below 100 tons displacement (which were not included in annex no. 11 of the Montreux Convention).

(5) Declaring that some chalants passing through the Straits were being transformed into vessels of a warlike nature and used to harass Allied

[6] The Times, London, May 8, 1941, p. 2.

shipping, the British Government requested that in accordance with the provisions of the Montreux Convention passage should be denied to such German vessels. Now the various categories of warships as listed in the London Naval Treaty of March 25, 1936, were enumerated in the Montreux Convention; and Hague Convention No. VII of 1907, as signed by Great Britain, not to mention the Oxford Manual (dated 1913) of the Institute of International Law, also contained pertinent definitions. In view of the fact that none of the ships which had passed through the Straits were of a category which came within the scope of such definitions the British Government were informed accordingly.

(6) On it being learned that two large commercial ships of Rumanian nationality lying in İstanbul harbor intended to pass through the Straits for the purpose of taking part in evacuating the Crimea, we prevented their departure. These ships had been lying at anchor in İstanbul port ever since the day that Germany attacked Russia. It is required that these ships (which, by lying within the boundaries of our territorial waters, safeguard themselves against attacks on the part of Russian submarines) should remain there for the duration of the war; any other course of action would be contrary to our neutrality according to the three points agreed to at Washington.

(7) I come now to the incident which closed with the resignation of our Foreign Minister and resulted in the Turkish Foreign Ministry being taken over by Prime Minister Şükrü Saracoğlu, who is well known in America also.

Great Britain had drawn the attention of the Turkish Government to German ships of a commercial character passing recently from the Black Sea to the Aegean. The ships in question were ships of the *Mannheim* and *Ems* types, some of 800 and others of less than 100 tons. Great Britain contended that they could be used to carry equipment, supplies, and troops, and also serve as submarine chasers, all of which were warlike purposes. It was also suggested that these ships were being disarmed by the Germans prior to their passage through the Straits and re-equipped with new guns after entering the Aegean in an effort to turn the situation there into their own favor. Finally it was demanded that these ships, classified in the category of warships, should be prohibited passage through the Straits in accordance with the provisions of the Montreux Convention.

The German Embassy declared that the ships in question were merely commercial vessels owned by private individuals and private companies and plying back and forth for commercial purposes only, which meant that according to the provisions of Art. 4 of the Montreux Convention they were entitled to the right of unhindered passage through the Straits.

The problem was not a simple one, for, according to Art. 4 of the Montreux Convention as read out in the House of Commons by Churchill, all commercial vessels irrespective of nationality or type of cargo were in fact en-

titled to passage, and the Convention, which says that all vessels not specifically classified as warships are commercial ships, lists the various types of warships (without however defining a warship exactly). Art. 7 of the London Naval Treaty of 1936 describing warships of less than 100 tons had not been annexed to the lists containing the classes or categories of warships borrowed from that Treaty, nor was there anything in the minutes of the proceedings to indicate the reason for this omission. Nevertheless the Turkish Government, which had no thoughts other than the fair application of the provisions of the Montreux Convention, looked on the question as one of appreciation rather than of interpretation, and announced openly and definitely that the rights and potential resources of Turkey could in no way be used against her ally Great Britain or against her friends Soviet Russia and the United States.

The German ship *Cassel* had been stopped at the Straits. On her cargo being unloaded and a thorough examination being carried out, it was revealed that this ship had been built in 1943, that she carried armor-plating nine millimeters thick, and that she was equipped with several guns, machine-guns and torpedo-launching apparatus; and the Turkish Government announced her decision to deny passage to each of the ships concerned. It is my opinion that the above situation was one totally different from the mere application of Art. 4 mentioned by Churchill, for although at that time he had made no representations to Turkey in connection with the ships then passing through the Straits, now he informed us that the ships were auxiliary German ships in disguise. Thus we were faced, not with Art. 4, but with Art. 19 of the Convention. Turkey had undertaken not to allow warships to pass through the Straits and she therefore had the right to determine to her own satisfaction whether ships seeking passage did or did not fall within one or another of the different categories of warships and, if they did, to prohibit their passage. Acting with the straightforward fairness which always inspires its decisions, the Turkish Government made use of this right.

The Straits have lost nothing of the political, economic and military importance bestowed on them by virtue of the geographical position which they occupy in the world. In debating in 1935 whether the United States of America would or would not continue her policy of isolationism, the well-known American historian, Frank H. Simonds, had pointed out that just as the frontier of England was on the Rhine so was it necessary to decide whether the River Amur, the Nile, and the Danube were or were not the frontiers of the United States. It was Germany and Japan that imposed a speedy decision in this connection: the United States of America is now in Asia, in Africa and in Europe and the Nile and the Danube which form two of America's borders empty their waters into the Mediterranean and the Black Sea which are joined by our Straits. In accordance with the wish expressed by the chief American observer at the Lausanne Conference, ships of all the

nations now reach the Black Sea coast and warships may enter that sea in order to protect them.

In his *Suez and Panama,* published in 1940, André Siegfried says that Britain would fight for a strait because this constitutes for her not merely a question of power but of very existence. It is true that Siegfried had in mind Gibraltar and the Suez Canal, but, as John Pagot put it, Maydos is also a Gibraltar, and, as Curzon pointed out, 80 per cent of the ships that pass through the Straits belong to countries that have no coastline in the Black Sea. The rich and prosperous coastline of the Black Sea is joined to the oceans by way of our Straits and Suez and Gibraltar: the history of our Straits is also the history of Great Britain.

As emphasized by Litvinof, the Straits constitute a vital artery for Russia and the history of the Straits is closely intertwined with that of Russia. In the midst of the sometimes reciprocal and sometimes conflicting policies of the Great Powers the Republic of Turkey will continue to apply fairly the provisions of the Convention for regulation of the Straits. It is possible that a policy of straightforward fairness does not breed love, but neither does it drag one into doubtful adventures or give rise to discontent.

Istanbul, astride the Straits which retain their importance, and one of the most important and beautiful cities of the world, is getting ready to celebrate in truly international fashion the five hundredth anniversary of its capture. Sancta Sophia, one of the historical treasures of this historical city, is being restored under the supervision of an American professor and is open to all nations; the University of İstanbul, raised on the Capitolium of Justinian the Lawmaker, stands out as one of the few really great centers of learning in the world; and the most honored place at this University has been accorded to the Turkish Institute of International Law so highly praised by Professor Brown.

The Turkish Institute of International Law intends to invite to its chairs next year experts on international law from America, England, and Russia. Where is the man of learning who would not be attracted by the thought of making heard to all the world the principles of the law of nations from a center which combines every beauty of nature with all the riches of history?

How fortunate is the Republic of Turkey in having at its head its National Chief İsmet İnönü who, even as he had done at the head of the heroic armies which he led to victory, proclaimed at Lausanne and in the course of the years that have elapsed since Lausanne his unwavering attachment to the principles of international law. Let the nation which he guides with capability and perspicacity enter the war on the side of the Allies or let her remain non-belligerent but attached to the Allied cause and conscious of having aided them in their darkest days, Turkey, which has confidence in its rights over the Straits which cut its Motherland in two, in its strength and in itself still constitutes a factor of security for the world and the Family of Nations.

INTERNATIONAL LABOR CONFERENCE: TWENTY-SIXTH SESSION

By SMITH SIMPSON

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The twenty-sixth session of the International Labor Conference—one of the more important in its history—was held at Philadelphia between April 20 and May 12, 1944. Forty-one countries were represented by official delegations [1] and three by observers,[2] making a total of forty-four countries represented. Twenty-eight delegations were fully tripartite [3] while twenty-three contained cabinet ministers and members of legislative bodies.[4] If the size of the session was a noteworthy indication of interest in its agenda,[5] the delegates' national rank and experience—political and technical—was hardly less so.[6]

* On leave for government service.

[1] This number includes Costa Rica, which was admitted to the Organization by action of the Conference. Provisional Record of the Conference, No. 2 (communication to the Conference on the subject) and No. 4, p. 14 (report of the Selection Committee), p. 15 (admission of Costa Rica voted by the Conference).

[2] Iceland, Nicaragua, and Paraguay were represented by official observers. Danish observers also attended the Conference. As in 1941, there were no delegations from Bulgaria, Finland, Hungary, Rumania, Spain, and the USSR.

[3] That is, sent two government delegates, one worker delegate, and one employer delegate. These countries included the leading industrial countries, the governments-in-exile, most of the Latin American countries, and the British Dominions. The full list of countries sending complete delegations is as follows: United States of America, Argentina, Australia, Belgium, Bolivia, Brazil, British Empire, Canada, Chile, China, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, France, Greece, India, Mexico, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Union of South Africa, Sweden, and Yugoslavia.

[4] In the United States delegation Senator Elbert D. Thomas, Chairman of the Senate Committee on Labor and a member of the Senate Foreign Relations Committee, was one of the two Government delegates and Mrs. Margaret C. Smith, Member of Congress from Maine, was one of the twelve government advisers.

[5] The size of the session was also an interesting indication of the transportation which could be eked out by the United Nations, in the midst of war, for an international gathering. The total number of delegates and advisers in attendance was 360. Two other international conferences dealing with post-war problems and policies were not so large: the United Nations Conference on Food and Agriculture was attended by 291 government representatives, the first meeting of the Council of the United Nations Relief and Rehabilitation Administration by representatives numbering from 292 to 337, the Bretton Woods Conference by 296. See note 8, below.

[6] In addition to those of ministerial and legislative status were innumerable government delegates and advisers who were under-secretaries, assistant deputy ministers, labor ministers of states and provinces, directors of departments and chairmen of boards. The delegates and advisers of employers and workers likewise brought to the Conference considerable experience with many of the subjects on the agenda.

"What Bretton Woods was to money, what Hot Springs was to food, Philadelphia was to the 'social question,' *i.e.*, the conditions under which men live and labor." [7] That, in general, was the significance of the twenty-sixth session of the Labor Conference: it was a link in a chain of international conferences directed to the development of post-war programs.[8] It is not surprising, therefore, that the agenda of the Conference included not only technical questions of the type commonly handled by the Conference but policy questions basic to the I.L.O. and the post-war social policy of the United Nations.[9] The Conference thus permitted at one and the same time a continuation of the technical work of the I.L.O. and a contribution to the international and national discussion anticipatory of the post-war period.[10] For these reasons the session, as the agenda itself, was unique in the history of the Conference; its results, as some commentators have noted, promise to have considerable social and international significance.[11]

[7] "What Is the I.L.O.?," Fortune, Sept., 1944, p. 160.

[8] The United Nations Conference on Food and Agriculture was held at Hot Springs, Virginia, May 18–June 3, 1943. See United Nations Conference on Food and Agriculture: Final Act and Section Reports, Washington, 1943. The first session of the Council of UNRRA was held at Atlantic City, N. J., Nov. 10–Dec. 1, 1943. See First Session of the Council of the United Nations Relief and Rehabilitation Administration, Selected Documents, Washington, 1944. The United Nations Monetary and Financial Conference was held at Bretton Woods, New Hampshire, July 1 to July 22, 1944; Final Act (Doc. 492 of the Conference, dated July 22, 1944, mimeographed). See also Carter Goodrich, "International Labor Conference of 1944," Monthly Labor Review, Vol. 58 (1944), p. 490.

[9] The agenda of the Conference included the following items:

I. Future policy, program, and status of the International Labor Organization.
II. Recommendations to the United Nations for present and post-war social policy.
III. The organization of employment in the transition from war to peace.
IV. Social security: principles, and problems arising out of the war.
V. Minimum standards of social policy in dependent territories.
VI. Reports on the application of Conventions (Article 22 of the Constitution).
VII. Director's Report.

[10] Partly because of the broad policy questions on the agenda, the session was given unusual attention in many countries, particularly in the United States, the United Kingdom and Latin America. In the United States, the newspapers of Philadelphia and nearby cities devoted considerable front-page publicity to the session which was also the subject of extensive comment by editors and columnists throughout the nation. For some of the events and proposals to the Conference which stimulated additional journalistic interest in the session as it proceeded, see the New York Times, April 28 and 29, May 1 and 3, 1944. Special facilities were extended to newspaper, magazine, and radio correspondents by the International Labor Office itself, which facilitated the session's publicity. For a reference to this see Prov. Rec., Nos. 22 at p. 189 and 36 at p. 279. For the first time in their histories, the Saturday Evening Post and Fortune, inspired by the Conference, carried articles on the I.L.O., the Post on April 15, 1944 ("An International Organization at Work," by John G. Winant and Fortune in Sept., 1944 ("What Is the I.L.O.?").

The tenth anniversary of the membership of the United States in the I.L.O. (some time later) evoked renewed newspaper references to the decisions of the Conference. See, for example, Washington Post, Aug. 20, 1944.

[11] See, for example, Walter Lippmann's comment in his column "Today and Tomorrow,"

I. Social Policy

The declarations and activities of governments and international organizations in the recent years of depression and war have served to etch more deeply the social policies of governments which had already become faintly outlined in the beginning of the present century. During World War I there were no international institutions which could contribute to this development. During the present war the International Labor Organization has provided an established international mechanism for this purpose. First in 1941 and again this year the Conference of the I.L.O. has debated social policy—national and international—and has called to the attention of governments, labor unions, and employer organizations objectives of international collaboration in war and peace.[12] It is in this context that one must appraise two resolutions adopted by the twenty-sixth session of the International Labor Conference, one dealing with "economic policies for the attainment of social objectives" and the other with social provisions in the peace settlement.

New York Herald Tribune, May 20, 1944; The Economist, London, Vol. CXLVII, No. 5266 (July 29, 1944), p. 143. See the debate in the House of Commons, Parliamentary Debates, House of Commons, Vol. 401 (June 21, 1944; daily issue), col. 223, where the Minister of Labor, in a debate on the White Paper setting forth the British Government's employment policies said: "We welcome the initiative taken in the employment field by the International Labour Organisation. Attention should be particularly directed to the resolutions passed at Philadelphia on the economic policies for the attainment of social objectives which are broadly in line with the policy of this White Paper." See also same, Vol. 402 (July 26, 1944), cols. 777 ff. for the debate on the International Labor Conference. The editors of Business Week on May 20, 1944 commented (p. 120): "Already the highlights of what is to be known as the Philadelphia Charter are beaming out on the airwaves to underground radios in the Nazi continent. Already the leaflets in a dozen languages are being dropped on Fortress Europe."

On May 29, 1944, the President transmitted to Congress the declaration, the resolution concerning economic policies, and the resolution concerning social provisions of the peace settlement, as certain "important decisions" of the Conference of which he thought "the Congress should be informed," New York Times, May 30, 1944; Congressional Record (daily issue), Vol. 90, pp. 5181 (Senate) and 5187 (House). Later, on Aug. 22, 1944, in commemoration of the tenth anniversary of the membership of the United States in the I.L.O., the President transmitted to Congress the seven Recommendations adopted by the Conference. The same, pp. 7248 (Senate) and 7271–2 (House).

[12] The 1941 Conference was held in New York and Washington. It was not a session of the International Labor Conference but a "Conference of the International Labor Organization." See Record of Proceedings, Conference of the International Labour Organisation, 1941, New York and Washington, D. C., Montreal, 1941. For reviews of that Conference see "The Social Objective in Wartime and World Reconstruction: the New York Conference of the International Labour Organisation," International Labour Review, Vol. 45 (1942), pp. 1–24; Carter Goodrich, "Program of the International Labor Organization," Monthly Labor Review, Vol. 54 (1942), pp. 305–317; Smith Simpson, "The International Labor Conference, 1941," American Political Science Review, Vol. 36 (1942), pp. 102–104; and Robert J. Watt, "The I.L.O. Conference," American Federationist, Vol. XLVIII, No. 12 (Dec., 1941), p. 9.

The first of these resolutions covers a broad field of national and international economic policy.[13] It endorses the establishment of UNRRA; urges the continuation of the existing machinery of international coördination and control of supplies as long as it is needed to ensure their fair allocation and to prevent excessive price movements; supports the establishment of permanent international organizations on food and agriculture and on exchange stabilization and investment; urges the adoption of those commercial policies which would contribute to the expansion of international trade; and recommends concerted action among the United Nations to ensure adequate supplies of essential raw materials and foodstuffs at reasonable and stable prices and to aim to ensure to those engaged in the production of the commodities concerned fair wages, satisfactory working conditions, and adequate social security protection. Special consideration is urged of the needs of those countries devastated by the war.

In the area of national policies this resolution urges the formulation of comprehensive programs by governments and employers' and workers' organizations for prompt and orderly reconversion, reconstruction, and economic expansion. Certain policies and procedures for such programs are recommended, emphasis being placed on the discouragement of monopolistic practices and encouragement of technological progress.

Closely allied to this resolution, and designed to give it effect in the "peace settlement," was a second which suggested certain social principles which the Conference considered appropriate for inclusion in "a general or special treaty or agreement between nations desirous of giving early effect to the

[13] International Labor Office, Official Bulletin, Vol. XXVI, pp. 92–99, for text. Prov. Rec., No. 28 (report of the Conference Committee); No. 35, pp. 255–6 (discussion and adoption by the Conference). For the text of the resolution as proposed by the Office, see Report II, Recommendations to the United Nations for Present and Post-War Social Policy, International Labour Conference, Twenty-sixth Session, Montreal, 1944, pp. 71–76.

This Resolution has been construed as an expression of the I.L.O.'s responsibility, expressed in the Declaration on aims and purposes of the I.L.O. (adopted by the Conference and described below), to "examine and consider all international economic and financial policies and measures." Historically this would appear to be a somewhat limited view. Beginning with its first session in Washington in 1919 delegates to the International Labor Conference have assumed the responsibility of discussing all "economic and financial policies and measures" insofar as these affect labor standards. The Director's Report, from the very first, likewise assumed the responsibility of discussing these matters. The Office assumed the same responsibility in preparing its reports on the textile industry in preparation for the World Textile Conference in Washington in 1937. International Labor Office, The World Textile Industry: Economic and Social Problems, Geneva, 1937. It is true that while delegates, the Director, and the Office have assumed the responsibility of discussing "international economic and financial policies and measures," the responsibility (as compared with the right) of the Conference as a whole to adopt resolutions or make other appropriate decisions concerning them has not been formally acknowledged until the adoption of the Declaration on aims and purposes. It would seem clear, however, that none of the decisions of the twenty-sixth session depend on the Declaration for their justification.

principles of the Atlantic Charter and Article VII of the Mutual Aid Agreement." [14] According to this resolution governments should, in such a treaty or agreement, reaffirm the Declaration of the Aims and Purposes of the I.L.O. (referred to below) and place on the agenda of the International Labor Conference annually the subject of the extent to which the social objectives set forth in that Declaration have been attained. Governments should direct their international economic arrangements to the expansion of production, employment, and the exchange and consumption of goods and to the liberation of economic activity from unreasonable restrictions. They should acknowledge that such matters as employment, the raising of living standards, social security and the like are of international concern and among the proper objectives of international as well as national policy. They should authorize the International Labor Office to collect uniform statistical and other economic information on matters which are declared to be of international concern and of direct interest to the I.L.O.; [15] they should report to the International Labor Office on the status of relevant legislation and administration and, in so far as practicable, of practices under collective agreements between employers and workers, in respect to draft international Conventions and Recommendations.

The resolution recommends that the Conventions and Recommendations concerning indigenous workers already adopted by the International Labor Conference be applied to dependent territories of the Axis Powers; that labor standards should be incorporated in the peace settlement; and that the Governing Body should appoint a committee to advise with reference to such standards. Finally, anticipating periods of general unemployment during and after the peace settlement, the resolution recommends that the Governing Body of the I.L.O. call a special conference "when there is danger of a substantial fall in general employment levels for the purpose of recommending appropriate national or international measures to prevent the development or spread of unemployment and to establish conditions under which high levels of employment may be maintained or restored." [16] An-

[14] Official Bulletin, as cited, pp. 78–85. Prov. Rec., No. 34 (report of the Conference Committee); No. 35, pp. 256–8 (discussion and adoption by the Conference). For the text of the resolution as proposed by the Office, see Report II, as cited, pp. 77–81.

[15] These matters are:

1. Employment, wages, and conditions of work;
2. Standards of living and the distribution of income, with particular reference to wage and salaried workers;
3. Technical education and training for employment;
4. Industrial health, safety, and welfare;
5. Industrial relations;
6. Social security;
7. Administration of labor and social security legislation.

[16] The proposed conference would be an I.L.O. conference: Part II, paragraph 1, of the Resolution.

other section of the resolution, directed more specifically to policy commitments of governments in advance of such a danger, recommends that a conference of representatives of the Governments of the United Nations and other nations be called "at an early date, in association with the Governing Body of the International Labor Office, to consider an international agreement on domestic policies of employment and unemployment." [17] In one of the Conference's noteworthy emphases on "full employment," this resolution further recommends that the Governing Body of the I.L.O. "correlate the activities of the I.L.O. toward the end of maintaining full employment with those of any other international agency or agencies which may be designated by the United Nations to have primary responsibility in related economic fields."

From these two resolutions emerges the social program which the Conference would have the United Nations adopt. The care with which the provisions of these Resolutions were examined in committees and subcommittees of the Conference and the large measure of support which they received from the Conference are indicative of the degree to which they express the objectives and principles of the enlightened community of nations today. The significance of the Resolutions, therefore, is not so much in any of their specific provisions as in (1) their comprehensiveness, (2) their appearance in the midst of war, and (3) their adoption by delegates not only of governments but of employers' and workers' organizations. In no other war has such a program been developed by such an assembly.[18]

The purpose of these two Resolutions is to assist governments in defining their social policies, avoiding a repetition of the ineffectiveness and confusion of uncoördinated or contradictory policies at the end of the last war, and shaping national and international programs of action to social justice and peace. They were the manifestation of a "clear desire to apply the principles of democracy to the future ordering of the world." [19]

Implicit in the development of so comprehensive a social program was, of course, the question of ways and means of carrying it out and this, in turn,

[17] Part V of the Resolution.

[18] One finds a remarkable continuity between earlier Director's Reports of the International Labor Office and the resolutions adopted by the twenty-sixth session. Much of the orientation and content of these resolutions will be found, for example, in The I.L.O. and Reconstruction, Report by the Acting Director of the International Labour Office to the Conference of the International Labour Organisation, New York, Oct. 1941, Montreal, 1941. This points, perhaps, to the influence of a permanent staff of international officials in the development of international policy; but in a broader sense it also indicates the success with which the I.L.O. has identified itself with a developing social consciousness throughout the world.

[19] Memorandum on the Twenty-sixth Session of the International Labour Conference, Montreal, 1944, p. 4. This Memorandum was issued in advance of the Conference to provide preliminary information on the agenda of the Conference.

presented to the Conference, as one of its first-rate issues, the future of the I.L.O. itself. What changes should be made, if any, in the scope and functions of the Organization? What should be done to increase its effectiveness and accelerate national action upon International Labor Conventions and Recommendations? Should the character or legal force of Recommendations be altered so as to increase their influence in the development of labor standards? How should various problems of membership and representation in the I.L.O. be met? What regional and industrial development within the Organization should be envisaged? How should the Organization be related to other international organizations? What constitutional changes should be considered?

To assist discussion and action by the Conference upon this issue, the International Labor Office submitted a report of nearly 200 pages with the text of a Declaration Concerning the Aims and Purposes of the International Labor Organization, a Resolution Concerning the Constitutional Practice of the International Labor Organization and two other resolutions.[20] The Declarations on Aims and Purposes as adopted by the Conference was designed to provide a new statement of the general "methods and principles" incorporated in the constitution of the I.L.O. in 1919.[21] The Declaration of 1944 emphasizes objectives rather than measures, and, for the first time in an international statement, affords a systematic articulation of those popular aspirations which in recent years depression and war have brought to a sharp focus. The Declaration affirms that "poverty anywhere constitutes a danger to prosperity everywhere" and that "the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare." The right is affirmed of "all human beings, irrespective of race, creed or sex, to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity" and the attainment of the economic and social conditions in which this shall be possible is stated to constitute the "central aim of national and international policy." [22] The responsibility of the I.L.O. is affirmed "to examine and consider all international economic and financial policies and measures in the light of this fundamental objective." In discharging this responsibility the I.L.O. "may include

[20] Report I, Future Policy, Programme and Status of the International Labour Organisation, International Labour Conference, Twenty-sixth Session, Montreal, 1944.

[21] Same, p. 3. For text of the Declaration as finally adopted, see Official Bulletin, as cited, pp. 1–3. Prov. Rec., as cited, No. 16, pp. ii–iv (text submitted by the special drafting committee of the Conference); No. 22, pp. 184–5 (action by the Conference), 185–6 (comment of the Acting Director of the Office).

[22] Part II, paragraph (b).

in its decisions and recommendations any provisions which it considers appropriate." [23]

The resolution on the I.L.O.'s constitution and constitutional practice proposed by the Office—a lengthy document of nineteen paragraphs on some thirteen questions—was drafted "with a view to consolidating and developing existing practice so as to lay a more secure foundation for the developments contemplated" in the future.[24] Due to an attitude of caution on the part of many delegates, the resolution on this subject adopted by the Conference was restricted to five paragraphs dealing with the relations of the I.L.O. with the League during the present interim period, the regional and industrial development of the Organization, and the Organization's relations to other public international organizations which now exist or may be established.[25] Several other questions covered in the draft prepared by the Office were either covered in brief supplementary resolutions or referred to the Governing Body for further consideration.[26]

[23] Part II, paragraph (e). The Declaration therefore is not simply a testament of faith, hope and benevolence but an important recasting of the objectives of the Organization. Whereas the earlier statement of aims and purposes of the I.L.O. catalogued abuses which the I.L.O. should assist in correcting, the present Declaration calls attention to a general program of national and international action directed toward the elimination of poverty and want. See article by Walter Lippmann referred to above, note 11.

In remarks to the delegates during a reception at the White House following the Conference President Roosevelt said of the Declaration on aims and purposes adopted by the Conference: "Your Declaration sums up the aspirations of an epoch which has known two world wars. I confidently believe that future generations will look back upon it as a landmark in world thinking." Department of State Bulletin, Vol. X, No. 256 (May 20, 1944), pp. 481–482. See also remarks of Walter Nash, President of the Conference: Prov. Rec., No. 36, p. 276.

[24] Report I, p. 113. For text of the resolution as drafted by the Office: same, pp. 187–191. The general subjects with which the resolution dealt included membership in the Organization, financial contributions by member states, the Governing Body's constitution and powers, reports and information from member states, committees, technical and special conferences, regional organization, relationships with other international organizations, complaints concerning the non-observance of International Labor Conventions, technical and other assistance to governments by the International Labor Office, representation at the International Labor Conference, freedom of speech of members of the Governing Body and delegates to the Conference while engaged in their official duties as such, and the international character of the Office.

In addition, the Office proposed a resolution "concerning facilities for the efficient discharge of the responsibilities entrusted to the International Labour Organisation," dealing with such matters as immunity of the Organization from suit and legal process, inviolability of its premises, exemption from taxation, correspondence, circulation of publications, and travel facilities: same, pp. 192–194. This resolution was referred to the Governing Body for further consideration. For a similar resolution see First Session of the Council of the United Nations Relief and Rehabilitation Administration: Selected Documents, pp. 62–63.

[25] Official Bulletin, as cited, pp. 89–91 for text. Prov. Rec., Nos. 5 at p. 21, 6 at p. 36, 7 at p. 55, 8 at p. 70, 9 at p. 90 and 10 at p. 109 (general discussion); also No. 21, pp. ii–iii (report of committee); No. 35, p. 254 (adoption by the Conference).

[26] A resolution was adopted on the international character of the responsibilities of the

The cautiousness of delegates concerning proposals of the Office on the future rôle and development of the I.L.O. arose from several causes. Governments-in-exile had had no opportunity of "consulting public opinion in their own country" on such important matters as those covered in the proposed resolution.[27] Governments had not been given an opportunity to submit their views to the Office before the final draft of the proposals was laid before the Conference, in accordance with the usual procedure, and many governments had not received the Office Report in time to give it thorough consideration before the departure of their delegates for the Conference.[28] It was felt, also, that certain of the provisions of the proposed Resolution exceeded "a simple effort to define and consolidate the sphere of influence of the I.L.O." [29] Furthermore this proposed resolution, together with the other proposals under Items I and II were "regarded as political, in the sense that they impinge on national policies which have not yet been defined." [30] The League of Nations issue was an additional reason for caution, the feeling being expressed that this was not a time to disturb the complex relationships of the only existing general international organization.[31] The result was that only those general constitutional principles were adopted which seemed "useful to direct the work of the Organization at the present time." [32]

II. European Questions

Europe, as a highly industrialized continent, with advanced social legislation, has played a conspicuous part in the development of the I.L.O., and its occupation, enslavement, and spoliation by the Nazis have created industrial and social problems necessitating special consideration by the Conference.

Director and staff of the International Labor Office: Official Bulletin, pp. 91–92; Prov. Rec., No. 35, p. 254 (action by the Conference). This resolution embodied paragraph 19 of the draft resolution on constitutional practices prepared by the Office. Other resolutions, discussed below, dealt with industrial committees and regional conferences.

[27] Prov. Rec., No. 7, p. 57 (van den Tempel, Netherlands Government). See, however, the remarks of Messrs. van Zeeland (Belgian Government), same, p. 61; Stancyk (Polish Government), pp. 66, 67; Soubbotitch (Yugoslav Government), pp. 76, 77.

[28] Same, No. 7, p. 57 (van den Tempel); No. 8, p. 75 (Hambro, Norwegian Government and member of Supervisory Commission of the League of Nations). The Indian Government had not received the report before the departure of its delegates. See Minutes of the Committee on Items I and II, CI–II/PV 4, p. 3.

[29] Prov. Rec., No. 7, p. 57 (van den Tempel).

[30] Same, No. 10, p. 109 (Martin, Canadian Government).

[31] Same, No. 8, p. 74 (Hambro); No. 10, pp. 110–111 (Martin).

[32] Remarks of Mr. Claxton (Canadian Government delegate) in the Committee on Items I and II. CI–II/PV 4, p. 1. For a more extended analysis of the Constitutional issues raised at the Conference, see Smith Simpson, "Constitutional Development of the I.L.O. as Affected by the Recent International Labor Conference," American Political Science Review, Vol. XXXVIII (1944), pp. 719–725. Various proposals concerning the constitutional development of the Organization were made by the delegates, but these were not acted upon. See note 25, above.

As has been noted above, the resolution on economic policies urged that the needs of countries devastated by the war receive special consideration. Not only did the resolution on social provisions in the peace settlement likewise urge that "particular consideration should be given to measures for promoting the reconstruction of economic life in countries whose economic and social life has been disrupted as the result of Axis aggression,"[33] but it was obviously calculated to bear on many of those problems created by the occupation of Europe with which the peace settlement would necessarily deal.

A special resolution had been drafted by the International Labor Office concerning the labor policy of the United Nations toward Germany and other totalitarian countries in Europe during the occupation of those countries by "the forces of the United Nations." This resolution proposed the liquidation of the German Labor Front and related associations; the elimination of Nazis from all posts in labor and social administration; the termination of economic and social discrimination on grounds of race or religion; the release of labor leaders from imprisonment; the restoration of freedom of association; and the appointment of a United Nations Labor Commissioner to supervise the administration of social and labor laws and regulations. To assist the Commissioner an advisory board was proposed consisting of representatives of workers in the territory concerned and of the principal international trade union organizations and trade union movements of the leading United Nations.[34]

The Conference neither adopted these proposals nor substituted any of its own. It was pointed out by the British Government that the Conference, lacking representation from one of the three principal United Nations directly concerned, and containing representation from neutral countries, was not an appropriate place for the discussion of such proposals. Workers' representatives from some of the occupied countries also objected to voting assurances to German workers when the condition of their own people was far from determined. The decision was made to refer the matter to the Governing Body for further consideration.[35]

The same spirit of cautiousness characterized the Conference attitude toward a second proposal of the Office which was intended to safeguard the social security rights of those European workers dragooned to Germany by the Nazi régime. These workers, for the most part, have been contributing to the German pension insurance system. Since it is unlikely that any appreciable number of them will become entitled to pensions (old age or invalidity) when their term of employment in Germany will have become concluded and they return to their respective countries, the problem is to assure that their contributions will not be dissipated.[36] The Office proposal

[33] Art. II. [34] Report II, pp. 82–85.

[35] Prov. Rec., No. 26, p. i (report of committee); No. 35, p. 255 (action by the Conference).

[36] Report IV (2), Social Security: Principles, and Problems Arising out of the War, Twenty-sixth Session, International Labour Conference, Montreal, 1944, pp. iv–v.

was in the form of a draft Convention based upon the principles of the Maintenance of Migrants' Pension Rights Convention of 1935 and open to the adherence of all states whether members of the I.L.O. or not.[37]

For this proposed Convention, open to all countries, the Conference substituted a resolution recommending the obligations which the peace settlement should impose unilaterally upon Axis and associated countries. These obligations are designed to protect social insurance contributions of all kinds, to provide "full indemnities" in respect to all claims of a social character,[38] to protect the social rights of workers involved in any transfer of territories resulting from the peace settlement, and to revive the bilateral treaties made by various European countries with Axis countries on labor and social matters in the inter-war period. The Governing Body is invited to appoint a special committee to prepare the precise provisions, embodying these obligations, for incorporation in the peace settlement.[39]

In the course of the Conference, the representatives of the occupied countries of Europe held meetings for the discussion of their common interests. In a declaration to the Conference they expressed their conviction that their respective countries would address themselves to the objectives of full employment, higher standards of living and social security proclaimed by the Conference. The declaration pointed out, however, that the problems in the path of rehabilitation of their countries were considerable and demanded not only their own action but "concerted effort in the international domain." It appealed to the "international solidarity forged between the United Nations during the war" to make available the essential goods required for the economic and social restoration of their countries.[40] In a resolution replying to this declaration, the Conference likewise appealed to "international solidarity" and affirmed "the determination of the International Labor Organization to associate its endeavors with the concerted will of the oppressed nations for the purpose of rebuilding their social life according to principles of international solidarity and respect for the fundamental spiritual and human values." [41]

[37] Same, p. 48 (text), 22 (comment).

[38] These claims would include pension, accident, and unemployment insurance as well as "sums payable out of public funds to social insurance institutions under the legislation of the country in which the recruited worker was employed." They include "liability for the aggravation of the risks of invalidity and death during the period of employment in the recruiting country, so that the insurance institutions of the countries of origin would be indemnified for their heavier expenditure for pensions during the years following the cessation of hostilities." They include claims of individual nationals of the United Nations in respect to treatment contrary to international law or other inequitable treatment connected with working conditions and social protection. For text of the resolution see Official Bulletin, p. 104. For report of the Conference committee see Prov. Rec., No. 18, p. xxviii.

[39] Same, No. 29, p. 216 (action by the Conference).

[40] Official Bulletin, pp. 86–89.

[41] Same, pp. 85–86.

III. Regionalism and Industrialism

Dissimilarities in the social, and hence in the labor, conditions in various parts of the world have rarely failed to give rise to suggestions at the International Labor Conference for the improvement of I.L.O. service to member countries. Beginning with its first session in 1919, the Conference has provided a favorable opportunity for the expression of these regional interests.[42]

Over the years, the I.L.O. has had recourse to various techniques in meeting the increasing demands of regional interests. The government group at an early session of the International Labor Conference arranged that one of the four elective seats on the Governing Body should go to a non-European country. The employers' and workers' groups early granted at least one seat on the Governing Body out of the six at their disposal to representatives of overseas countries. The system of deputy members was also instituted early in I.L.O. history to provide additional extra-European participation in the Governing Body. The practice grew up of holding sessions of the Governing Body in capitals of different countries. A delegation of the Governing Body has been sent to South Africa, and expert advisers to various governments, especially in the South American region. Regional conferences of the American countries have been held. Increasingly, Office publications have been issued in Spanish; additional Office correspondents have been appointed in Latin America; and American (North and South) experts have been added to the technical committees of the Office. In 1939, the European war preventing a full meeting of the Permanent Agricultural Committee, the American members of this Committee met in Havana. In 1940 an Inter-American Committee to Promote Social Security was established under the auspices of the I.L.O. In 1941 three Canadian-United States meetings on manpower problems were held under the auspices of the I.L.O.

In recent years pressure upon the I.L.O. to provide treatment of both particular regional and special industrial problems has increased. The dispersal of the center of gravity in I.L.O. membership from Europe, the failure of some countries to maintain membership or active participation in the Organization and the crowded agenda of the Governing Body and the International Labor Conference have produced such an effect. So also have the development of industries with common world-wide interests, a certain regionalization in the war's destruction, the stimulus given by the war to particular industrial developments and other similar factors.

For these reasons the regional and industrial development of the I.L.O.

[42] The strong regional interests expressed at the Washington Conference in 1919 centered around such issues as the election of the Governing Body, official languages of the Conference and the Organization, selection of Conference Committees, election of Conference Officers and special consideration requested by committees of certain regions in connection with various conventions adopted by the Conference.

became one of the more important questions of the Conference.[43] It figured in the consideration given not only to the special situation of European countries referred to above but to the whole future development of the Organization. It arose in connection with the social security items on the agenda [44] and again in connection with the election of the new Governing Body.[45] It

[43] In his reply to the Conference debate on the Director's Report Mr. Phelan remarked: "The emphasis which has been laid upon the importance of vigorous regional action by the International Labour Organisation in many parts of the world has indeed been one of the outstanding features of this Conference." Prov. Rec., No. 22, p. 188. See also "The Twenty-sixth Session of the International Labour Conference," International Labour Review, Vol. L (1944), pp. 1, 35.

[44] The resolution adopted by the Conference on the subject of an Asiatic Conference arose in connection with the social security items and was considered by the committee dealing with these items. See First Report of the Committee on Social Security, Prov. Rec., No. 16, p. vi.

[45] By Article 7 of the I.L.O. Constitution delegates to the Conference select the eight non-permanent government members of the Governing Body as well as the employers' and workers' members. China became one of the eight members of chief industrial importance by virtue of a decision of the Governing Body at its ninety-second session and, Spain having withdrawn from the Organization, two non-permanent government seats on the Governing Body were vacant. These were filled by the election of Peru and Greece. By virtue of the elections by the Conference the Governing Body now consists of the following members:

1. *Government Seats*

A. *Permanent*

United States of America	Great Britain
Belgium	India
Canada	Netherlands
France	China

B. *Temporary*

Brazil	Mexico	Yugoslavia
Chile	Norway	Peru
	Poland	Greece

2. *Workers' Seats*

Regular	*Deputy*
Mr. Hallsworth (British Empire)	Mr. Crofts (Australia)
Mr. Watt (United States of America)	Mr. Oldenbroek (Netherlands)
Mr. Andersson (Sweden)	Mr. Kosina (Czechoslovakia)
Mr. Laurent (France)	Mr. Ibañez (Chile)
Mr. Rens (Belgium)	Mr. Downes (Union of South Africa)
Mr. Chu Hsueh-fan (China)	Mr. Adamczyk (Poland)
Mr. Lombardo Toledano (Mexico)	Mr. Nordahl (Norway)
Mr. Bengough (Canada)	Mr. Mehta (India)

3. *Employers' Seats*

Regular	*Deputy*
Col. Antoine (France)	Mr. Li Ming (China)
Col. Chapa (Mexico)	Mr. Dahl (Norway)
Mr. Erulkar (India)	Mr. Macdonnell (Canada)
Sir John Forbes Watson (British Empire)	Mr. Cowley Herñandez (Cuba)

arose in connection with the budget of the I.L.O., the contemplated expansion of the Office staff and the creation of an additional Assistant Directorship of the Office.[46] Underlying much of the Conference's work, therefore, was the effort to accord greater attention to those peculiar problems which lay close to the special regions and industries of the world.

The Conference expressed the view that the International Labor Office should set up industrial sections and that the Governing Body should draft regulations governing the activities of industrial committees.[47] It suggested a Near and Middle Eastern Conference [48] and recommended an Asiatic Conference.[49] In addition the Acting Director expressed his belief that the

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Mr. Gemmill (Union of South Africa)	Mr. Falter (Poland)
Mr. Harriman (United States of America)	Mr. Kulukundis (Greece)
Mr. Joassart (Belgium)	Mr. Warning (Netherlands)
Mr. Morawetz (Czechoslovakia)	Mr. Banats (Yugoslavia)

It was agreed that the term of office of the new members of the Governing Body should expire at the next ordinary session of the Conference. Concise accounts of the ninety-second and ninety-third sessions of the Governing Body will be found in International Labour Review, Vol. L, No. 1 (July 1944), pp. 73–80. See also New York Times, May 1, 1944.

[46] The Indian Government delegate, referring to the doubts entertained in his country as to whether India was "getting value from the money paid to the League of Nations," stated his Government's anxiety that "the Asiatic side of the Organisation be strengthened" and suggested that the International Labor Office should undertake continuously "a careful scrutiny of the reports of all kinds received from Asiatic countries, a scrutiny done on the spot and done quickly, and circulated to us in Asiatic countries. We would like them to prepare memoranda based on new improvements taking place in other countries and send us a report telling us which of those particular new improvements in other countries might be suitable to us in Asiatic countries. I do not think that they do that at the present time. They send us a lot of paper. We may not have time to study it all and we cannot ourselves always pick out that part of it which is of most value to us. We would welcome the help of the I.L.O. in doing that for us." Prov. Rec., No. 17, p. 157.

[47] These committees would deal with the labor problems of separate industries, as the Joint Maritime Commission deals with those of the maritime industry. For text of the resolution see Official Bulletin, p. 92, and Prov. Rec., No. 21, p. iv (report of Committee); No. 35, p. 255 (action by the Conference). No conclusion was reached as to whether such committees should be bi-partite or tri-partite. It was felt that this question required further consideration by the Governing Body. Workers' members of the subcommittee which considered the subject of industrial committees expressed a definite preference for a tripartite constitution. Nor did the subcommittee reach any conclusions as to the scope of activities of industrial committees. There is a reference to the subject in I.L.O. and Reconstruction, work cited, pp. 105–108, and the 1941 Conference adopted a resolution requesting the Director of the International Labor Office "to begin immediately the preparation of a definite scheme for the establishment, under the aegis of the International Labour Organisation, of a World Textile Office, based on the tripartite principle, to be responsible for the international organisation of economic and social measures to secure prosperity and social justice in the textile industry." Proceedings, p. 165.

[48] Official Bulletin, p. 101 for text; Prov. Rec., No. 35, p. 255 (discussion and adoption).

[49] Official Bulletin, p. 113 for text. Prov. Rec., No. 23, p. 213 (adoption without discussion).

time "is rapidly approaching when we should resume our American regional conferences" [50] and various resolutions were adopted with a view to cementing the relations of American countries with the I.L.O. One of these resolutions voiced the hope of the Conference that all American countries would resume active membership in the Organization and be represented at its next session [51] and a second requested the Governing Body to consider the possibility of making Spanish and Portuguese official languages of the Organization.[52]

IV. Technical Questions

Two of the technical items on the agenda concerned problems immediately arising from the war and the anticipated transition from war to peace: social security and employment. On these items the bulk of the Conference Recommendations were adopted.[53] They can be briefly summarized as follows:

1. Income Security

The lengthy Recommendation adopted by the Conference on this subject covers the whole field of social insurance (sickness, maternity, invalidity, old age, death of breadwinner, unemployment, employment injuries, and certain emergency expenses) and certain forms of social assistance, from the standpoints of coverage, eligibility, benefit rates, contribution conditions, and administration.[54]

[50] Prov. Rec., No. 22, p. 189. Mr. Phelan added: "I am particularly glad that, in spite of the limited resources at the disposal of the Office, we have been successful in our efforts to make good the promise which I made at the New York Conference to produce more of our publications in Spanish, and we will continue our efforts in that direction." Referring to the Inter-American Conference on Social Security, he remarked: "The Office will be glad to do everything in its power to help this agency to perform the important regional tasks which lie within its field . . ." and added: "The Latin American countries have difficult and special problems which need to be discussed on a regional basis. . . ."

[51] Official Bulletin, p. 115 for text. Prov. Rec., No. 36, p. 274 (discussion and adoption).

[52] Official Bulletin, pp. 116–117 for text. Prov. Rec., No. 36, p. 274 (adopted without discussion). Reference has been made above to the readmission of Costa Rica to the Organization. Text of the resolution confirming this readmission will be found in Official Bulletin, p. 114.

[53] The adoption of the seven Recommendations by the Conference was an interesting development. For some years the strong inclination of the Conference was to decline dealing with any subject by a Recommendation alone. See The International Labour Organisation: The First Decade, Geneva, 1931, pp. 315 ff. The decision of the twenty-sixth session to adopt Recommendations was of course influenced by war conditions and the impracticability of adopting draft Conventions in the midst of such conditions. No draft Conventions were adopted by the session.

[54] Official Bulletin, p. 4 for text. Prov. Rec., No. 16, pp. v–xxxii (reports of the Conference Committee); No. 23, pp. 194–211 (discussion by the Conference); No. 23 at p. 212, No. 29 at p. 217, and No. 35 at p. 259 (action by the Conference). The form of this Recommendation marked something of a departure from that common to Recommendations previously adopted. "Guiding Principles" are first set forth, followed by suggestions for their applica-

2. Income Security and Medical Care for Persons Discharged from the Armed Forces, etc.

This Recommendation covers mustering-out grants to persons discharged from the armed forces, as well as unemployment insurance and assistance, pensions in the case of invalidity, old age or death, sickness, maternity and medical benefits.[55]

3. Medical Care

This Recommendation sets forth the essential features of a medical care service, its forms, coverage, relationships with general health services, financing, supervision, and administration.[56]

4. Employment Organization

This Recommendation outlines the general principles which the Conference considers members of the Organization should take into account in the demobilization of the armed forces and of assimilated services and the repatriation of prisoners of war, persons who have been deported, and others. Among those principles are collection of adequate information by governments, development of national programs of industrial demobilization and reconversion in coöperation with employers' and workers' organizations, the widest possible use of employment service facilities by employers and workers, provision of public vocational guidance facilities, formulation by governments of a positive policy in regard to the location of industry and the diversification of economic activity, provision of training, retraining and rehabilitation programs, and the adoption of measures to regularize employment in those industries and occupations in which work is irregular.[57]

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tion. This form permitted the inclusion of details and principles which might discourage or prevent the adoption of the Recommendation if incorporated in it as basic principles. Compare the form of Recommendation No. 53 concerning safety provisions in the building industry: Conventions and Recommendations, 1919–1937, Geneva, 1937, p. 455; International Labor Code, 1939, Montreal, 1941, Arts. 387–390. There was some discussion as to whether the three texts prepared by the Office on the subjects of income security, medical care, and social security for persons discharged from the armed services, etc., in the form of Recommendations, should be adopted as Recommendations or resolutions, the chief advocacy of the latter form of action being assumed by the British Government. It was decided to adopt them as Recommendations.

[55] Official Bulletin, pp. 26–28 for text. Prov. Rec., No. 16, pp. xxxiii–xxxvi (report of the Conference committee); No. 23, pp. 194–211 (discussion by the Conference); Nos. 23 at p. 213 and 35 at p. 260 (action by the Conference).

[56] Official Bulletin, pp. 29–45 for text. Prov. Rec., No. 18, pp. i–xxvi (report of the Conference committee); No. 29, pp. 218–220 (discussion by the Conference); No. 29 at p. 220 and No. 36 at p. 266 (action by the Conference).

[57] Official Bulletin, p. 61 for text. Prov. Rec., Nos. 20 at pp. i–xxxix and 27 at pp. i–ii (report of the Conference committee); No. 31, pp. 237–246 (discussion by the Conference); Nos. 31 at pp. 247–248 and 36 at p. 269 (action by the Conference).

5. Employment Services

This Recommendation sets forth the responsibilities which employment services and related authorities should assume in discharging their "essential duty . . . to ensure, in coöperation with other public and private bodies concerned, the best possible organisation of industrial, agricultural and other employment as an integral part of the national programme for the full use of productive resources." [58]

6. National Planning of Public Works

This Recommendation outlines the general principles which should guide the members of the Organization in the planning of public works programs, including the development and timing of programs over a sufficiently long term so as to provide adequately for changing conditions.[59]

The third technical item on the Conference's agenda concerned long-run social policy with respect to dependent territories and the Recommendation on this subject is a synthesis of the various Recommendations and Conventions developed by the I.L.O. since 1919 and some of the more significant advances which have occurred in colonial policy since those Recommendations and Conventions were adopted. The forty-seven articles of the Recommendation set forth the general economic and social objectives and principles which should guide the development of dependent territories. Provisions cover such specific subjects as slavery, opium, forced labor, recruiting of workers, contracts of employment, penal sanctions, employment of women, children, and young persons, remuneration, health, housing, and social security, discrimination, inspection, freedom of organization and coöperatives.[60]

Each of the seven Recommendations contains a provision that members of the Organization should report to the International Labor Office from time to time, as requested by the Governing Body, concerning the measures taken to give effect to the principles set forth in the Recommendation.

V. Appraisal

The achievements of the Conference should be appraised in the light of the difficulties which beset it. The size of the session has already been remarked.

[58] Official Bulletin, pp. 74–75 for text. Prov. Rec., No. 20 at pp. xvi–xvii (report of the Conference committee); No. 31, pp. 237–246 (discussion by the Conference); Nos. 31 at pp. 247–248 and 36 at p. 270 (action by the Conference).

[59] Official Bulletin, pp. 75–77 for text. Prov. Rec., No. 20 at pp. xvii–xviii (report of the Conference committee); No. 31, pp. 237–246 (discussion by the Conference); Nos. 31 at pp. 247–248 and 36 at p. 271 (action by the Conference).

[60] Official Bulletin, pp. 45 ff for text. Prov. Rec., Nos. 19 and 24 (report of the Conference committee); Nos. 29 at pp. 220 ff and 31 at pp. 231 ff (discussion by the Conference); Nos. 31 at pp. 235–236 and 36 at p. 267 (action by the Conference). While this was a technical item, it presented a number of social and political issues of the first order. See New York Times, April 27 and May 3, 1944.

While the national rank and experience of delegates and advisers was a favorable factor, the fact remains that a certain amount of international experience is also required for the successful running of international conferences. The long time which had elapsed since the last session meant that at Philadelphia there was a larger proportion than usual of delegates and advisers unfamiliar with the "complicated procedure" of the Conference.[61]

The difficulties created for international conferences by differences of language, temperament, experience, and the fleeting character of the conferences themselves are multiplied by the combination of governmental and functional representation in the International Labor Conference. The Office and Conference have therefore developed special procedures to overcome these difficulties, some of which were not available to the twenty-sixth session, due to war-time conditions.[62] Other procedures by which agreement is reached in this international tripartite gathering had become "to some extent forgotten or rusty from lack of use." [63] Furthermore, as already noted, the first two items of the agenda raised questions of primary political importance, some of which were related to negotiations being carried on between the foreign offices of various of the United Nations and on which, therefore, governments were disposed to proceed only with the greatest caution.

In spite of these difficulties considerable pressure was exerted on the I.L.O. to make the most of its established mechanisms in the development of suitable international programs to meet the economic and social problems germinated by a second World War. The change in the economic and military situation of the United Nations and the possibility that the end of the war might arrive before the Conference met again, which the agenda of the Conference had reflected, also were reflected in the effort of the Office and delegates to utilize the Conference and the I.L.O. to maximum effect.[64]

A result of these various factors was that many amendments to the Office texts of "an unusual character, better perhaps described as counter-proposals," were offered and required extended consideration.[65] Another result

[61] For reference to this factor see the reply of the Acting Director of the International Labor Office, Prov. Rec. No. 22, p. 187. No Conference had been held for three years and no regular session for six. The 1941 Conference was a Conference of the International Labor Organization, not a regular session of the International Labor Conference. Of the 360 persons attending the twenty-sixth session 64 had attended the 1941 Conference. Of these 64 only 22 had attended the twenty-fifth session in 1938.

[62] Prov. Rec., No. 22, p. 187.

[63] Same. See also remarks of Congresswoman Margaret Chase Smith in the House of Representatives: Congressional Record, Vol. 90, p. A2347 (daily issue).

[64] The Conference was not unaware of the preparations for the invasion of Northern France which occurred on June 6. In the provision of travel arrangements it had been made clear to delegations that no assurance could be offered of an immediate return to their respective capitals. The atmosphere of the Conference was therefore surcharged with the expectation of momentous military developments. This had the effect of inducing caution on the part of many delegates.

[65] Prov. Rec., No. 22, p. 188.

was that, instead of the usual number of committees and subcommittees established by a session of the International Labor Conference, there were required for the twenty-sixth session ten full committees and six subcommittees, many of which were obliged to meet simultaneously. This meant that the secretariat as well as delegates and advisers were overtaxed, along with printing and other facilities available to the Conference.

For all these reasons a certain amount of confusion and delay characterized the proceedings of the Conference. Even as to the technical items there was unusual difficulty in developing the areas of international agreement. In summing up the Conference the Acting Director, who was present at the first and second sessions of the Conference (rather historic for their confusion), remarked: "I have never in my experience worked with a Conference in which the strain on delegates was so great or in which it was so difficult to follow the processes of discussion and decision." [66]

In spite of these difficulties committees of the Conference gave the sustained and detailed consideration to the agenda which enabled the Conference to transact its business within a period only one day longer than its usual three-week duration. Exceptionally able leadership was given to the Conference by its President, Walter Nash, then the New Zealand Minister to the United States; [67] an experienced Governing Body provided guidance; and the International Labor Office furnished the Conference with texts and explanatory material with which to start and assisted the proceedings throughout.[68] The Conference, finally, came at a time of widespread popular demand for action by the United Nations to prepare for the post-war period and the international spirit of those in attendance at the Conference facilitated the meeting of this demand by the Conference.[69] Consequently the Recommendations and Resolutions of the Conference are both numerous and detailed, and deal with principles of basic importance in the demobiliza-

[66] Same, pp. 187, 275 (closing remarks of the President of the Conference) and 280 (closing remarks of Sir John Forbes Watson). See also New York Times, April 21, 1944, etc., esp. April 28, 29.

[67] See report by Hon. Elbert D. Thomas, United States Senator, and one of the government delegates of the United States to the Conference, Congressional Record, Vol. 90 (daily issue), May 31, 1944, p. A2863. Also Prov. Rec., No. 36, p. 280 (closing remarks of Robert J. Watt), p. 281 (closing remarks of Roberto Fontaina).

[68] So far as is known, the practice of the International Labor Office in systematically preparing reports on the agenda items of the Labor Conference is unique among international organizations. It has had the effect, through the years, of greatly facilitating action by the Conference by providing all delegates a starting point of discussion. This practice has had the effect, also, of preserving a continuing and consistent policy or point of view with respect to matters in which the I.L.O. is interested. The declaration and resolutions adopted by the twenty-sixth session, for instance, bear a striking relationship to the Acting Director's Report to the 1941 Conference of the I.L.O.: The I.L.O. and Reconstruction, Montreal, 1941.

[69] See remarks of the Honorable George Tomlinson, Joint Parliamentary Secretary, Ministry of Labor and National Service, and one of the government delegates of the British Empire to the Conference. Parliamentary Debates, House of Commons (daily issue), July 26, 1944, col. 778.

tion of a militarized world and the organization of peace. The Conference, therefore, not only expressed an authoritative opinion on the problems of social policy—by no means an inconsiderable function of an international assembly—but assisted in the development of a program of action with which to meet those problems.

Nearly four years had elapsed between the fall of France, when the peoples of the free world and their institutions found themselves "on the very brink of defeat," and the twenty-sixth session of the International Labor Conference. The little space which separated freedom from disaster in 1940 was indeed "narrow and precarious." [70] By April 20, 1944, when the first regular session of the International Labor Conference held since 1939 convened, that space had widened considerably. In that period of time, as has been well pointed out, three basic developments had emerged more and more distinctly: the relative economic-military strength of the free peoples of the world; the conviction that "only through unity of action can there be achieved in this world the results which are essential for the continuance of free peoples"; and a conviction that free governments cannot exist side by side with Nazi or Fascist governments.[71] "Every session of the Conference," it has been remarked, "has its own distinguishing characteristic." [72] The twenty-sixth was no exception. In the forward-looking, even audacious, character of its decisions it reflected the recent military, economic, and other international developments favorable to the cause of freedom.

The Conference provided a unique forum for the development of an international social program—the most comprehensive to be developed by any international assembly in modern times. Basic to this program are the principles—in a way revolutionary principles—that "poverty anywhere constitutes a danger to prosperity everywhere" and that the "war against want" requires to be vigorously waged not only within nations but by their united efforts. It is significant that the objective of this program is not only "full employment" and the material well-being that goes with "full employment" but spiritual well-being as well. These far-reaching principles and objectives were not simply incorporated in a testament of aims and purposes but in the principal decisions concerning social policy which were taken by the Conference.

[70] For recent and vivid references to those desperate days, when disaster was imminent, see the address of Secretary of State Cordell Hull, April 9, 1944, and remarks of President Roosevelt to the Conference delegates on May 17, 1944. The Secretary's address will be found in Department of State Bulletin, Vol. X, No. 251 (April 15, 1944), pp. 335–342, and the President's remarks in, same, No. 256 (May 20, 1944), pp. 481–482. For a description of the desperate situation of the I.L.O. see Smith Simpson, The International Labor Organization in 1940, this JOURNAL, Vol. XXXV (1941), pp. 359–363; also The I.L.O. and Reconstruction, as cited, Chapter I.

[71] Address of the Secretary of State, April 9, 1944, as cited.

[72] The I.L.O. and Reconstruction, p. 1.

INTERNATIONAL LEGISLATION IN THE FIELD OF TRANSPORTATION

By GUSTAV POLLACZEK

The economic interdependence of the different countries of the world explains the great importance of international transportation and, consequently, of legal rules able to make sure that the transfer of goods with the utmost simplicity, safety, and speed will be practicable. If this is true for the world as a whole it is, obviously, even truer in the case of Europe, a densely populated area, divided among many sovereign states. Up to a certain point the purely national legislation of the different countries may be able to provide for international transportation as well, but this point is soon reached and then international coöperation becomes a necessity. This works, at first, through bipartite agreements—which also serve as stop-gaps when attempts at broader collaboration have failed—but the truly promising way to regulate international transportation is by multipartite conventions. In Europe agreements of this type have existed for a long time. They were crucial for the past development of the continent and they are bound to assume an even greater importance for its reconstruction after the present war.

It seems obvious that no international convention possesses *per se* the magic power to facilitate the carriage of goods and to further thereby commerce and peaceful intercourse among the nations of the world. To do this these arrangements have to be practicable, progressive, and equitable in spirit and, if not emanating from one single source, as closely coördinated as possible. In other words they must contain obligations, certainly obligations that can be fulfilled, yet obligations and not merely pious wishes, and they have to protect the legitimate interests of all the contracting powers and of carriers and shippers alike. The problem of coördination is two-pronged as it were. Combined transportation (by air, by rail, by road, by sea, and by inland navigation) will play a big part in the world of tomorrow and the coördination of the different services of transportation demands, of necessity, the harmonious adjustment of the statutes and treaties relating to them.

But different sets of international legislators are active not merely in different fields of transportation but frequently in one and the same field. In evaluating this branch of international legislation, as far as Europe and certain other parts of the old world are concerned, its achievements in the past and its prospects for the future, one has, in fact, to start with the admission that it sprang from at least three quite different sources. There was, first, a system of time-honored conventions, initiated by the European governments of the nineteenth century, certainly not faultless, but very

valuable indeed. This had to compete, however, from the outset, with numerous agreements among carriers, some of them liberally endowed with legal or at least quasi-legal power, and—in the years between the two world wars—with the legislation sponsored by the League of Nations. It will be important for the future regulation of these matters to assess these different sets of international conventions and agreements both as to their intrinsic merits and as to their practical effect in relation to the work done by competing legislators.

I. *The Berne Conventions*

International coöperation in the field of land-transportation started in Europe at the time of the unquestioned predominance of the railroads.[1] These enterprises had become, in many respects, a unit long before World War I. This was due not only to coöperation among the companies themselves but also to two important sets of international agreements.

The Final Protocols of the International Conferences for the Technical Unity of Railroads of 1882, 1886, and 1907[2] contained provisions on the permanent roadbed (uniform width of tracks), on rolling stock (standardization of railroad equipment), and on the loading of freight cars. Imperial Russia was not a party to these conventions; she preferred, for strategic reasons, a national solution (wide track), but coöperated with the other continental powers in preparing the first Berne Convention on the Transport of Goods by Rail of 1890 (*Convention Internationale concernant le Transport des Marchandises par Chemins de Fer*).[3] The original project sprang from private initiative, however, not an uncommon case in the history of international legislation. Two Swiss lawyers, de Seigneux of Geneva and Christ of Basel, aroused their Government to action, impressed by the legal dif-

[1] Abbreviations used in this article:

B.T.I.: Bulletin des Transports Internationaux par Chemins de Fer, Berne.

C.I.M.: Convention Internationale concernant le Transport des Marchandises par Chemins de Fer (International Convention on the Transports of Goods by Rail).

C.I.V.: Convention Internationale concernant le Transport des Voyageurs et des Bagages par Chemins de Fer (International Convention concerning the Transport of Passengers and Baggage by Rail).

Chamberlain: Joseph P. Chamberlain, International Organization, in International Conciliation No. 385, December, 1942.

Hudson: Manley O. Hudson, International Legislation, Washington, 1931–1931–.

League: League of Nations Publications.

Masters: Ruth D. Masters, International Organization of European Rail Transport, in International Conciliation No. 330, May, 1937.

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[2] Hudson, Vol. I, p. xxiv; 2 Martens, *Nouveau Receuil Général* (3d series), p. 888; Masters, p. 500. They were, in each Conference, supplemented by Final Protocols "concerning the locking up of freight cars intended to pass custom barriers."

[3] Hudson, p. xxvii; 19 Martens, *N.R.G.* (2d series), p. 289.

ficulties which were bound to arise as soon as goods had to be carried through different countries with different legal systems. These difficulties were especially embarrassing in cases of damage, of loss, and of delayed delivery, because it was usually uncertain which of the carriers could be sued, the tribunals of which country must be invoked, and which of the different national laws and statutes of limitations applied.[4]

To meet these difficulties the parties to the first Convention agreed on the collective responsibility of the carriers in most cases (cp. Art. 26 and 40f of the Convention on the Transport of Goods) and assumed the obligation to execute judgments rendered in any other member state (Art. 55). But they went even farther, establishing the principles of liberty of access and of transit; of obligatory maintenance of the lines "in a position to satisfy the obligations imposed on them by the Convention," clearly implied in Articles 1 and 58; of the duty to accept international shipments, explicitly imposed on the carriers in Art. 5; and of the publicity of the railroad tariffs (compulsory publication, prohibition of private agreements, Art. 9)—not to speak of the gradually amplified rules concerning bills of lading (Art. 6), the calculation of freight charges (Art. 10), delivery periods (Art. 11), procedure at frontiers (Articles 13 and 15) and on alterations of the transport contract (Art. 21f).

Thus this treaty constituted a very complete set of regulations, especially if compared with the international conventions which attempt to regulate certain aspects of the transport of goods by sea and by inland navigation. If one examines international regulations of land transportation outside of Europe (the Code Bustamante, for example), one is impressed by the shortness and simplicity of their rules.[5] It need hardly be said that they would be entirely insufficient for Europe's dense traffic and that they will have to be considerably enlarged as soon as international traffic increases.[6] On account of their comprehensive and, on the whole, satisfactory rules the Berne Conventions have served as models not only for national statutes on transport by rail,[7] but also for international agreements among the railroads of members and non-members of the Berne Union,[8] and finally for the Warsaw Convention of 1929 "for the Unification of certain Rules regarding International Air Transport." [9]

[4] Chamberlain, p. 461. Somewhat similar are the difficulties encountered today in the field of air transport among American countries, not all of which have adhered to the Warsaw Convention of 1929.

[5] Articles 259 and 260: Hudson, Vol. IV, p. 2318.

[6] Already the lack of an adequate regulation is felt and the Berne Conventions are hinted at as suitable models: Hellmut Simons, *El Ferrocarril a Bolivia*, Buenos Aires, 1934, pp. 133, 134 and 234.

[7] E.g. for the Polish statute on transport by rail.

[8] Namely between the Russian and between certain British roads and railroads subject to the Berne Conventions. Cp. e.g. the London Convention concerning the transport of goods between Great Britain and Germany via Belgium, in *B.T.I.*, 1935, Annex, p. 251, later on transformed into the Convention concerning the transport of goods between the Continent and Great Britain via Belgium and the Netherlands, in *B.T.I.*, 1939, p. 260.

[9] Of October 12, 1929; Hudson, Vol. V, p. 100.

The treaty of 1890 established the "Central Office" at Berne "in order to facilitate and ensure the carrying out of the convention" (cp. Articles 57 of the Conventions of 1933) and entrusted it with the task of arbitrating disputes between the railways; [10] it also provided for the periodical revision of the convention: a conference for revision was to convene five years at the latest "after the putting into force of the modifications agreed upon by the preceding Conference" (Art. 60). This period should certainly be shortened, but that alone would not be enough. Since the new treaties have to be ratified by a sizable number of states (now fifteen; Articles 63 of the Conventions) before they can be put into force, the time elapsing between two conferences averages ten years. For the pace of ratification, although it compares favorably with the tardiness shown in the ratification of other international treaties, is still too slow, especially for a convention of the great practical significance of the Convention on the Transport of Goods.

Conferences for revision took place in the years 1898, 1906, 1923, and 1933. The first meetings did not change the picture very much and the treaty remained for all purposes the "Convention of 1890" even after the changes decided upon by these conferences had been put into force. The conferences of 1923 (1924 [11]) and 1933, however, designated their creations as the conventions "of 1924" [12] and "of 1933" [13] respectively, and rightly so, because they were in many respects quite different from their forerunners.

The conference of 1923 rearranged the treaty, transforming it, apart from some minor defects, into a logical sequence of statutory rules; but it did much less well respecting the material content of the convention. The conference, it is true, introduced a very important supplement to the principle of the collective responsibility of the carriers, namely the provision that an action can be brought against the carrier of destination even if it has not received the goods (Art. 42, 3), but it refused to improve the rules on the calculation of freight charges (Art. 9, now Art. 10), laid some obstacles in the way of claimants (Art. 40, 3), and took above all the more than doubtful step of limiting the amount of compensation payable in the cases of total or partial loss of goods (Art. 29), even in cases of wilful default or gross negligence on the part of the carriers (Art. 36).

This conference also concluded the second of the Berne Conventions "on the Transport of Passengers and of Baggage by Rail" (*Convention Interna-*

[10] Manley O. Hudson and Louis B. Sohn, Fifty years of arbitration in the Union of International Transport by Rail, this JOURNAL, Vol. 37 (1943), p. 597.

[11] Following an old practice the conventions were prepared by experts in 1923 and formally adopted by diplomats in 1924. In 1933 there was only one conference, both for the drafting and for the adoption of the conventions. It was, however, not possible to dispense with the customary diplomatic conference to determine the date of the entry into force of the conventions. This took place at Berne on November 17, 1937; Hudson, Vol. VII, p. 896.

[12] Hudson, Vol. II, p. 1393 (English and French versions).

[13] Hudson, Vol. VI, p. 527 (French version); *B.T.I.*, 1934, Annex, p. 71 (French, German and Italian versions). The conference sat at Rome, from October 3 to November 23, 1933.

tionale concernant le Transport des Voyageurs et des Bagages par Chemins de Fer),[14] which is still marred by two grave defects: the treaty applies only to journeys for which international tickets are issued (Art. 1, 1) and leaves it to the carriers to stipulate in their tariffs when this should be done (Art. 1, 3). Furthermore, while the rules on the carriers' responsibility for baggage follow closely the pattern set by the Convention on Goods, their responsibility for the death of a passenger or for injuries resulting from an accident to the train and their liability for damages caused by lateness or cancellation of a train or by missing a connection "shall be subject to the laws and regulations of the state in which the event took place" (Art. 28). In this respect the Warsaw Convention of 1929, cited above, which is, in most of its parts, a rather incomplete copy of the Berne Conventions, far surpasses its model in value and in importance.

Although otherwise plainly reactionary in their decisions the legislators of 1923 laid two cornerstones which may be of great significance for the future of international transportation in the old world: they paved the way for the participation of "undertakings other than railroads" (Articles 2 of both Conventions) and they created the "Commission of Experts" (Art. 60, 2 C.I.V. and Annex VII C.I.M.).

This commission[15] exercises, like the International Committee on Aerial Navigation (C.I.N.A.[16]) and like most of the river commissions,[17] true legislative power delegated to it by the contracting powers; its decisions may become law without further action on their part. For the time being the range of its activity may seem modest for it has merely been established "to keep Annex I up to date." This Annex, however, a rather voluminous work,[18] contains important stipulations concerning the carriers' "duty to transport" (Art. 5). In spite of this general obligation the articles mentioned in Annex I are admitted only under the conditions laid down therein (Art. 4, 1). Annex I is occasionally compared with the British Dangerous Goods Act but the watchfulness of the Berne Union seems to go further than the British statute since the Annex also deals with goods which the uninitiated would be inclined to consider as rather harmless (e.g. charcoal, silk, bones and hides). Here rapid changes, both of the list and of the conditions, may seem indicated, changes which cannot wait for a revision conference and the action of the member states. The decisions of the Commission are, therefore, important for many shippers who have to comply with them in order to obtain transportation for their goods.

Very sharp economic sanctions are, furthermore, provided for cases of

[14] Hudson, Vol. II, p. 1468 (Conventions of 1924, English and French versions); Hudson, Vol. VI, p. 568 (Convention of 1933, French version; French, German and Italian texts in *B.T.I.*, 1935, Annex, p. 5). [15] Masters, p. 517; Chamberlain, p. 488.

[16] Cp. the Convention on the Regulation of Aerial Navigation, Paris, October 13, 1919, especially Chapter VIII; Hudson, Vol. I, pp. 359, 370.

[17] Joseph P. Chamberlain, The Regime of the International Rivers: Danube and Rhine, New York, 1923. [18] *B.T.I.*, 1938, Annex, p. 49.

"irregular, incorrect or incomplete declarations of goods enumerated in Annex I" and for nonobservance of the measures of security laid down in that Annex, namely fines ("extra charges," collected by and for the benefit of the carriers) varying from 1 to 15 gold francs per kilogram "gross weight of the whole package" (Art. 7, 5a). Unintentional violations of these complicated rules occur frequently and the carriers are ready to condone them in certain cases—a practice which poses a separate problem, since it may be economically justified in many instances, although contrary to the principle of equality of treatment and lending itself to discrimination between different shippers—but attach great value to the statutory rule as a potential weapon and as a means to keep their customers in line.

The Conference of 1933, besieged by the shippers and afraid of the competition of other transportation services, finally did something to liberalize the provisions concerning the calculation of freight charges (Art. 10, sec. e) without, however, fully acknowledging the shippers' right to the cheapest combination of rates. It reduced the delivery periods (Art. 11), raised the maxima of compensation in cases of loss of goods from fifty to one hundred gold francs per kilogram gross weight (Art. 29), and stressed the responsibility of the railroads for goods carried in open cars (Art. 28, 2) and for goods which are the objects of not one but two or more consecutive international transport contracts (Art. 27, 4). It also introduced many minor reforms but abandoned some important matters to the competing "agreements between two or more states" or even between the carriers.[18a]

The Conference elaborated a new Annex VII to the Convention on Goods, however, containing "regulations concerning the transport of private cars." These privately owned cars, which make up for deficiencies in the rolling stock of the railroads, are of special importance for the transport of oil, wine, fresh meat and fruit. Once built, however, they can obviously be used only on the tracks and the railroads, not afraid of losing these customers, insisted on and obtained a rather rigid regulation of this type of transportation.[19]

The Berne Conventions, which, incidentally, are still in force and continue to regulate the traffic between Germany and her satellites and the European neutrals, are, of course, not free from weaknesses, the elimination of which should be provided for in the coming Peace Treaties. A survey of the two competing sets of international legislation will give us a chance to discuss the more serious of these deficiencies.

II. *The activity of the League of Nations*

It may seem strange that neither of the last two revision conferences was to any great extent influenced by the activity in this field which at the very same time was so hopefully entered upon by the League of Nations. In addition there was, from 1919 onward, a potentially competing system of

[18a] See below, Part III.

[19] Cp. the bibliography in Hudson, Vol. VI, p. 563 and *B.T.I.*, 1937, p. 118.

international conventions which might have led to conflicts between two sets of treaties emanating from different international unions with partly overlapping membership. Conflicts of this kind are, of course, not entirely uncommon. Thus, when the authors of the first Berne Convention of 1890 decreed that the laws of the "country of despatch" should apply to the handing over of goods for transport (cp. Art. 14 *C.I.M.*) and, consequently, also to the loading of cars, they had, apparently, forgotten that the Protocol on the Technical Unity of Railroads, another international instrument,[19a] contained regulations on this matter which the contracting states were bound to observe.

One such conflict arose in point of fact. It concerned the rules on freight charges established by the Geneva Railroad Convention of 1923 [19b] and Art. 9 of the Berne Convention (*C.I.M.*) which had been drafted in the same year. It did no harm, however, apparently because all the parties concerned, namely, the governments parties to the convention and the carriers and shippers parties to individual transport contracts regarded the Geneva treaty as a declaration of principles rather than as a binding obligation. Both in this and in the case of other agreements concluded under the auspices of the League this opinion seems to be borne out by the cautious wording of the treaty and by the numerous exceptions admitted therein. This was rarely the fault of the Secretariat, which did its best to prepare workable texts, and to say that the treaties finally agreed upon were not too often practicable does not impeach the underlying ideas. On the contrary, most of the reforms advocated by the League were not only well meant but are still of great potential importance.

Article 23 of the Covenant envisaged provisions to secure and maintain freedom of communications and of transit, and equitable treatment of the commerce of the members of the League. The League could have tried to enact measures to this end directly, since both Assembly (Art. 3, 3) and Council (Art. 4, 4) were clothed with the power to deal, at their meetings, "with any matter within the sphere of action of the League or affecting the peace of the world." Yet decisions required the agreement "of all the Members of the League represented at the meeting" (Art. 5). It was, of course, extremely improbable that either the Assembly or the Council, the respective jurisdictional spheres of which were, by the way, not clearly defined, would, in such highly technical matters, unanimously agree to proposals laid before them by the Secretariat of the League. The League, or in our case its Communications and Transit Section, was, therefore, on the whole content to follow the example given by the older international bureaus and offices. The Section acted as the permanent secretariat for the "Advisory and Technical Committee for Communications and Transit," for its seven permanent committees (Budget, Legal, Ports and Maritime Navigation, Inland Navigation, Transport by Rail, Electric Questions, and Road

[19a] Note 2, above. [19b] Below, at note 40.

Traffic), for certain temporary committees and also for the General, Special, and Partial Conferences which, made up of especially designated delegates of the member states, had the task of deliberating upon and of drafting—by which they usually emasculated—the conventions proposed by the Section and by the committees.[20]

Article 24 of the Covenant provided that international bureaus should be placed under the authority of the League, those already established only with the consent of the parties, however. This consent did not materialize; while the rather powerful C.I.N.A.,[20a] a post-war creation, came nominally under the wings of the League, the Central Office at Berne and other bodies of its kind remained independent. Yet it seems worth mentioning that the Secretariat inaugurated what one might term a system of cross-representation. Its committees liberally admitted staff members of international bureaus and of certain other influential international organizations (e.g. of the International Chamber of Commerce) to their deliberations and when conferences convened by these bureaus took place members of the Section used to sit in as observers. This happened in the case of the fourth revision of the Berne Conventions (Conference of Rome, 1933)[20b] and was, undoubtedly, a step towards the indispensable coördination of the legislative efforts in the field of international transportation, although still a rather timid one.

Obviously the League commanded a much vaster organization than the modest Central Office at Berne. Yet it would be an oversimplification to say that their activities cannot be compared, the one being universal in its scope, the other active only in the field of European railroad transportation. It is true that between the two world wars the Berne Union had only one member that was not strictly European, namely Turkey, and that Turkey's Asiatic lines were not included in the Conventions. But this will probably change, due to the establishment of the ferry-boat traffic across the Bosphorus.[21] Before the World War I Russia's Asiatic roads were the longest single lines subject to the Convention of 1890[22] which, at that time, extended from the Spanish frontier[23] to the Pacific Ocean. Soviet Russia, like Great Britain,[24] used the Conventions as models for certain bipartite agreements[25] with neighboring states, but did not adhere to them, possibly on account of her somewhat strained relations with Switzerland. But a reversal of her attitude was, apparently, in the offing,[26] and it can be ex-

[20] Denis P. Myers, Handbook of the League of Nations, Boston, 1935, p. 54.

[20a] Above, note 16. [20b] Above, note 13. [21] *B.T.I.* 1939, p. 70. [22] *B.T.I.*, 1914, p. 29.

[23] Spain and Portugal joined the Berne Union after the first world war.

[24] As to the efforts to bring about adhesion by Great Britain to the Berne Conventions see Noë in *B.T.I.*, 1932, p. 272 and Eger in *B.T.I.*, 1938, p. 98.

[25] In the case of Great Britain they expanded into multipartite arrangements; note 8, above.

[26] It was, e.g., Maxime Litvinov who acted as reporter when the Council of the League intervened for a speedier ratification of the Conventions of 1933. League of Nations, Official Journal, 1936, p. 61.

pected that, after this war, Russia will revert to the Union which will make it intercontinental again, even on a much wider scale than before 1914, if one considers the new railroad links (Transcaucasia—Turkey—Syria—Palestine—Egypt, Russia—Persian Gulf, Russia and Siberia—Manchuria—Southern China) recently developed.

Thus the Berne Conventions are potentially international in the wider sense of the word. The part of their label which refers to transportation by rail is now somewhat misleading, however, since regular automobile or navigation services may, under certain conditions, also be entered in the "lists" provided for by Articles 2 of both instruments. A few years before World War II even a maritime service (Tallinn—Helsinki) joined the carriers subject to the *C.I.M.*

In another respect, however, the work of the League was, of necessity, more comprehensive than that of Berne. International legislation in the different fields of transportation was thus far mainly concerned with

1. liberty of transit;
2. the medium of transportation and certain facilities which make it usable (lines, signals, ports, and stations);
3. the vessel (mainly nationality, construction, equipment, seizure);
4. the crew (aptitude, social protection);
5. the transport of goods and of passengers.

The last item is clearly the real domain of the Berne Conventions, although they too reach occasionally out into other spheres (liberty of transit, lines, cars). The Communications and Transit Section of the League, on the other hand, considered it to be its duty to embark on a vast activity in every field of international transportation. It sponsored the Agreement concerning Maritime Signals,[27] the Convention and Statute on the International Regime of Maritime Ports,[28] the Convention and Statute on the Regime of Navigable Waterways of International Concern[29] and the three River Agreements of 1930[30] which, incidentally, never went into force. It also did its best to bring about a progressive regulation of international road transportation[31] and to unify the various, mostly bipartite, agreements on the junction of international railroad lines.[32]

This activity, although indirectly of great interest for the Berne Union and its planned regulation of combined transportation, did not really in-

[27] Of Lisbon, October 23, 1930; Hudson, Vol. V, p. 792.

[28] Of Geneva, November 9, 1923; Hudson, Vol. II, p. 1156.

[29] Of Barcelona, April 20, 1921; Hudson, Vol. I, p. 645.

[30] On Collisions, on the Registration of and on Rights in Rem over Inland Navigation Vessels, and on Rights of Inland Navigation Vessels to a Flag (Geneva, December 9, 1930; Husdon, Vol. V, pp. 815, 822 and 848).

[31] The idea of regulating international commercial motor transportation had to be abandoned; League 1931.VIII.10, p. 8; 1933.VIII.2, p. 5; 1934.VIII.2, p. 21; 1935.VIII.8, p. 29; and 1937.VIII.5, p. 25.

[32] League 1935.VIII.2, a monograph on "Juridical and Administrative Systems in Force on the Frontier Sections of Railway Lines and at Junction Stations."

terfere with the work already accomplished at Berne. But the whole procedure revealed all too often a serious lack of coördination, as e.g. in the case of the river legislation. Here international regulations on the transport of goods exist only in a rudimentary form,[33] even for one single river system. The ensuing difficulties did not pass unobserved and provoked the (unfulfilled) promise of the signatories of the Danube Statute [34] "to endeavour by the conclusion of separate conventions to establish uniform civil, commercial, sanitary and veterinary regulations relative to the exercise of navigation and to shipping contracts" (Art. 40) and the directive to the Elbe Commission "to draw up draft conventions for submission to the interested states for the unification of the laws and regulations applicable as regards commerce and navigation . . ." (Art. 70 of the Elbe Statute [35]). Meanwhile the League attempted a universal solution and failed [36] while Berne found a seemingly practical way to regulate combined transportation by rail and by inland navigation (Articles 2 *C.I.M.* and *C.I.V.*). This solution, which also applies to combined carriage by rail and by road, retains the Berne Treaties as bases but permits the carriers to change them in their tariffs.[37]

However the League also invaded the oldest domain of the Berne Conventions, with the best intention, needless to say. Inspired by Article 23 of its Covenant, it was, above all, concerned over "Freedom of Transit" (Convention and Statute of Barcelona of April 20, 1921 [38]). Inside of Europe and in peace time this had, to the best of this writer's knowledge, never been threatened, but the League intended clearly to create a Magna Carta of Transportation, applicable to the whole world and for which the solemn declaration of the liberty of transit was to lay the groundwork. This declaration was, in fact, followed by others, notably on reasonable and undiscriminating tariffs (Art. 2, pars. 2 and 4; cp. also Geneva Railroad Convention, below), on the cooperation in the regular upkeep of waterways of international concern,[39] and in the reënforcing of existing or the construction of new railroad lines.[40]

[33] E.g. scattered rules on the transport of dangerous goods.

[34] Of Paris, July 23, 1921; Hudson, Vol. I, p. 681.

[35] Of Dresden, February 22, 1922; Hudson, Vol. II, p. 835.

[36] See above, at note 30. As far as international rivers were concerned the European members of the League had granted concessions (Convention of Barcelona; see below, note 39) which the South American members were not ready to accord, being too jealous of their sovereignties, as Carlos Sosa-Rodrigues explains (*Le Droit Fluvial International et les Fleuves de l'Amerique Latine*, Paris, 1935, pp. 92 and 95). But when it came to national rivers the European Powers proved just as jealous; League 1934.VIII.2, pp. 16, 57, in spite of the urgent need for international regulations.

[37] The possible extent of these modifications has not been clearly defined, but it has been assumed that they may go rather far, in certain instances, and also in the case of combined transport by air and by rail, to which Articles 2, 4, *C.I.M.* and *C.I.V.* equally apply. Cp. this writer's articles in the Zoll-, Speditions-und Schiff-fahrtszeitung, Vienna, 1938, nos. 23, 24 and 25.

[38] Hudson, Vol. I, p. 625.

[39] Statute on the Regime of Navigable Waterways of International Concern, of Barcelona, April 20, 1921, the same, p. 645, Art. 10.

[40] Statute on the International Regime of Railways, of Geneva, December 9, 1923, II Hudson, p. 1138, Art. 1.

Yet both the Transit Convention of Barcelona and the Railroad Convention of Geneva were worded more than cautiously, and had there been anything suggestive of a real obligation it could easily have been made inoperative through one of the loopholes opened by both conventions.[41]

The provision on freedom of transit reads:

> Subject to the other provisions of this Statute, the measures taken by Contracting States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit (Stat. of Barcelona, Art. 2).

This provision was put to a test, as may be remembered, in the Polish-Lithuanian conflict which occupied the attention of the League for many years. Lithuania refused, after the occupation of Vilno, every intercourse with its stronger neighbor and closed, notably, the line Landwarów-Kaisiadorys, which constituted, for Poland and for the League also, an important link between Russia and certain Baltic ports.[42] The League argued that Lithuania, a party to the Convention and Statute of Barcelona on the Freedom of Transit,[43] was bound to reopen this line. But the Permanent Court at the The Hague was of a different opinion. Notable among its reasons was the frank declaration that the Statute could not apply because the line in question was obviously not in use, since it had been closed by Lithuania [44]—a rather severe condemnation of the practicability of the text of Barcelona.

Now the Berne Convention never speaks of "free transit," but stipulates that it applies to all goods handed in for transportation with a through bill of lading over the territory of at least two of the contracting states, if the goods are carried exclusively over lines included in the list drawn up under Article 58 of the Convention. To keep her frontiers closed after having signed and ratified this treaty would have constituted such an unmistakable manifestation of bad faith that Lithuania refrained from entering the Berne Union. This does not mean, of course, that it would have been impossible to misinterpret the provisions of the *C.I.M.*, but it certainly gives evidence of the great value attributed to the older convention.

Beside reasserting the principle of the freedom of transit and elaborating on it the Geneva Railway Statute of 1923 [45] purports to furnish the framework for world-wide coöperation between the railroads, hinting at the necessity for a junction of international lines, the establishment of through

[41] Namely emergency cases (Transit Statute, Art. 7, Railway Statute, Art. 29), grave economic situation arising out of devastation during the war 1914–1918 (Articles 12 and 34 respectively), lines constructed in the interest of particular localities or of national defense (Railway Statute, Art. 1, 4).

[42] League 1930.VIII.9, p. 10; cp. also League 1930.VIII.15, p. 21.

[43] Cp. the Memel Convention of May 8, 1924, League of Nations, Treaty Series, Vol. 29, p. 85: Annex III, Art. 3, the same, p. 113.

[44] Permanent Court of International Justice, Publications, Series A/B, No. 42, p. 120.

[45] See above, note 40.

trains, the progressive regulation of customs, police, and passport formalities, for reciprocity in the use of rolling stock, single transport contracts, and working financial arrangements between railway administrations. It thus gives a survey of what could be provided by way of coöperation, including many of the things which, in Europe at least, had been done long before.

The convention also contains a separate chapter (Part IV) on railroad tariffs, and provides, at the outset, judiciously and in accordance with what has been the practice for about a hundred years, that these tariffs shall fix the rates, the accessory costs, the classifications of goods to which the rates are applicable, and "the conditions to which such application shall be subject." These conditions, usually voluminous sets of complicated rules and regulations, are not merely an indispensable supplement to classification and rate schedules, but also the traditional hiding-place for subtle discrimination, both national and international, and also—mainly in international tariffs—the depository for the carriers' own legislative acts, both authorized and unauthorized:[45a]

Article 9 of the *C.I.M.* is quite explicit as to tariffs, stipulating that they must be legally in force (that is, conforming to national legislation as long as it does not contradict the treaty) duly published, applied in a uniform manner, and that they must contain "all information necessary for the purpose of calculating cost of carriage and accessory cost" (principles of legality, publicity, equality, and exclusiveness). These principles are excellent although it cannot be doubted that there is still room for improvement, especially as to the wording of the rules; not all of them are clear-cut and unambiguous and the student will also miss penalties for violations and omissions such as are provided for in the American Interstate Commerce Act.[46]

Article 19 of the Geneva Statute cannot, however, be regarded as an improvement, since it promises the railways "equitable remuneration for services which are not covered by the charges fixed in the tariffs." This is the one provision which, as said before, strictly contradicts the *C.I.M.* According to the Berne Conventions any such demands for remuneration (not to be confused with the repayment of expenditures) are illegal and the European courts have treated them as such.

The subsequent provisions of the Statute, however, deserve full approval (as to their tendency, not as to their overcautious and involved wording). They promise or rather hint at the desirability of refraining from all discrimination "of an unfair nature" (Art. 20, elaborating on Article 4 of the Transit Statute of Barcelona [46a]), of the establishment of international tariffs and the adoption of all measures tending to make possible the ready calcula-

[45a] See below, Part III.

[46] Cp., as to secret tariff reductions and the possible recourse, the explanations given by M. C. Noë, French Secretary of the Central Office: League 1937.VIII.5, p. 32.

[46a] See note 38, above.

tion of the transport charges (Art. 23) and—which is very important in view of the chaotic conditions obtaining in this respect—of uniformity in the mode of formulation of both international and national tariffs (Art. 24). It goes without saying that none of these announcements constitutes an unmistakable obligation comparable to the strict rules of the *C.I.M.* Some shippers tried to base their claims on Article 20, but were told by an Austrian court that what they complained of might be, in fact, discrimination, but not necessarily discrimination "of an unfair nature."[47] And Article 20 goes so far as to speak of an "undertaking" (in French: *engagement*), while Articles 23 and 24 indulge in the circumlocutions and sapping qualifications dear to the League legislation ("shall endeavour" to "promote," to "satisfy," to "facilitate" and so on).

Yet the underlying ideas were—and are—sound, and should have inspired the revision conferences of the Berne Conventions where these provisions rightly belong. But they were, apart from their own unfortunate diction, combined with too many others which, some being mere sketchy outlines of international legislation, some little more than tables of contents, aroused but mild surprise among the experts of the Berne Conventions. For most of the provisions of these older treaties are backed by a long record of professional debates in the revision conferences and before many of the European courts, while even the others are rarely entirely meaningless.

It is, under these circumstances, hard to understand why some European countries hesitated to ratify these innocuous declarations of good will. Some of them were, in this respect, certainly not blameless in connection with the Berne Conventions, but—to cite only one example,—Italy, France and Finland, each of which had ratified the latter within less than five years,—waited eleven, twelve and fourteen years respectively before ratifying the Railway Statute of the League.[48] It was small wonder that the Secretariat, discouraged by this experience, became increasingly cautious in its proposals.

III. *Intercompany agreements*

Of greater practical importance than the work of the League and also more serious from the point of view both of the uniformity and the equitableness of the international regulations were the legislative efforts of the railroad organizations themselves, all the more so since they were, to a certain extent, sanctioned by the Berne Conventions. Each of these agreements will frequently lay down a rule but leave its further implementation either to national laws or to agreements between two or more contracting states or to the carriers. In addition either states or carriers or both of them are commonly empowered to grant certain exceptions from the general rules.

If these provisions are not too important this procedure may be unobjec-

[47] Commercial Court of Vienna, judgment of December 15, 1933, Eger, *Eisenbahn-und Verkehrsrechtliche Abhandlungen und Entscheidungen*, Vol. 56, p. 68.

[48] Cp. German Reichsgericht, judgment of November 11, 1933, *B.T.I.*, 1934, p. 364.

tionable and even sensible, but—to cite only one among many instances—it seems rather strange to leave it to the railroads, in certain cases, to decide whether a shipment should be considered as international and therefore subject to the *C.I.M.* or not (Art. 1, 2b). It has been mentioned before that, in the transportation of passengers and baggage, the jurisdiction of the carriers goes even farther, and it should be added that, unlike the American Interstate Commerce Act, the *C.I.M.* (Goods) does not, in principle, apply to every shipment which begins in one state and ends in another. As a rule the decision is up to the shipper. He may consign his goods from, let us say, Paris directly to Zurich, in which case they are subject to the Berne Convention, but he also may avoid the international regulation by consigning the shipment with national documents, first, from Paris to Basel and then from Basel to Zurich. European commerce attached some value to this right, and for various reasons. Outstanding among them was the undeniable fact that some national regulations still offered more favorable conditions than did the Berne Convention. This was true for the French laws, especially before certain reactionary "amendments" to them had been hurriedly enacted by Pierre Laval's last pre-war cabinet. On this question, which is not without importance for the future of international transportation, it has to be remarked, first, that the proper procedure to be adopted here consists, obviously, not in the deterioration of the national laws but in the improvement of the Berne Conventions and, second, that the legal advantages which some national laws still offer are real only if the shipment remains subject to one of these laws only, in our example if the transport ends in Basel. Each reconsignment under a different national law, or even under the Berne Convention, adds new risks in cases of loss or damage, risks which have been hinted at above and which even the last revision of the Berne Conventions has not been able to diminish to a very great extent.

It is only fair to state that the original reason for entrusting the carriers with the regulation of certain seemingly minor questions was the desire to permit the relaxation of rather rigid rules where possible (Art. 4, 2; 12, 6, and 19, 1 of the *C.I.M.*) and to promote certain regional transport activity (same, Art. 6, 1). This practice threatens, however, to destroy the uniformity of European regulation and subjects commerce to the discretion of one—and incidentally of the economically stronger—of the parties to the transport contracts. Theoretically tariffs and even international tariffs remain subject to the supervision of the states, the carriers of which appear on the title-heads of the tariffs, and also to their national laws.[48] But this is necessarily a surface control only, as is apparent in every country of the world.[49]

The original and not entirely unsound idea has, furthermore, degenerated,

[49] Vice President Wallace declared that "in no year during the past ten years did the Interstate Commerce Commission review as many as one per cent of the tariffs filed with it." The New York Times, October 21, 1943, p. 21.

and the delegation of legislative power to the carriers has become a comfortable expedient permitting the revision conferences as such to avoid tackling delicate questions or simply to save time, and for the railroad men among the delegates, usually in the majority, to reserve the solution of these questions to their own committees and conferences.

Mention of these reasons suggests, at the same time, two serious deficiencies in the mechanism of revision of the Berne Conventions. Many member states used to prepare their proposals carefully, aided by organizations both of carriers and of shippers, but their laudable efforts could not make up the lack of preparation on an international scale. Faced with long and elaborate projects worked out by one delegation, others often delcared quite frankly that they had had no time to study the question before the conference, that there would be no time to study it during the session and to get in touch with their Governments, and that the whole project would therefore have to be put off until the next conference—a delay of about ten years, as has been explained before—unless a way could be found to divert it to the tariff-makers. And whatever zeal and industry the conferences used to show in debating the questions first on their schedules proved to be rather harmful for the treatment of the remaining ones. The Conference of 1933 [49a] lasted nearly two months but many problems were still unsolved when its end approached. The convenient way out was again to leave the solution to the carriers (e.g. Art. 24, 1 of the *C.I.M.*). Equally harmful was the predominant influence exercised by the railroads both on the preparatory work done by many contracting states and during the conferences where, owing also to the fact that the simplest way to find experts on transportation is to borrow them from the carriers, staff members of the railroads nearly always constituted the majority of the delegates.

To what this practice may lead can easily be imagined. At the occasion of the last revision (1933) seven of the contracting powers, in fact, surprised the Conference with the candid proposal, prepared by the International Railway Union in Paris, to permit the carriers to agree "through suitable clauses in their tariffs" on "adequate conditions for the transport of goods which on account of their nature or of the exigencies of traffic might require legal regulations different from the ones laid down in the Convention." This strange project was beaten after its implications had been made clear to the delegates.[50] But the latitude granted the carriers goes far enough. They are now entitled to regulate shipments with negotiable bills of lading, shipments to be delivered to the holder of the duplicate bill of lading only,

[49a] See note 13, above.

[50] Gustav Pollaczek, An attack on the *C.I.M.*, *Zoll-, Speditions-und Schiffahrtszeitung*, Vienna, 1933, No. 27, p. 6. This article—quoted, later on, with cautious approval by the Vice Director of the Central Office in *Zeitung des Vereins Mitteleuropaeischer Eisenbahnverwaltungen*, 1934, p. 480—had been published before the beginning of the Conference of Rome and distributed to the delegates.

of newspapers, of goods destined for fairs and exhibitions, of containers, of certain loading machinery (Art. 61, 3, nos. 1 to 6), and also shipments carried partly by rail and partly by air, by road, or by ship (Art. 2, 4).

The reasons for granting these exemptions were not the same in every case. Some of these goods are carried at rather low rates and the Conference felt that they did not deserve the same protection as better paying goods. As to the shipments of (and of goods in) containers which, in 1933, had not yet made much headway in Europe, and to the shipments with negotiable bills of lading—an outright innovation—it seems that the majority of the delegates did not believe in their importance, in spite of the insistence with which the League of Nations and the International Chamber of Commerce had advocated these new regulations. (When Maxime Litvinov requested the European Governments, on behalf of the League, to ratify the Berne Conventions of 1933 he mentioned especially these "shipments with negotiable documents." [51])

In the first six cases (Art. 61, 3 of the *C.I.M.*) the Conference admitted also legislation "by two or more governments," providing thus for something like a race between governments and railroads. In the case of the "Transports of Goods by Rail under Way Bill to Order" (Agreement of Rome [52]) the governments won easily because the railroads did not attach much significance to this innovation.

In Articles 2, 4 of both Conventions, relating to combined transportation, no such concession was made although it seems obvious that here, too, the governments would be free to enter into agreements. There were, in this case, more than the customary reasons,—lack of time, lack of preparation, and compliance with the wishes of the carriers,—which prompted the Conference to entrust them with legislative powers. We do not intend to deal here with the whole question of combined transportation, long neglected, and yet of great potential importance. But it should be mentioned, as another illuminating instance of the lack of coöperation between the different sets of international experts and law-makers, that the Conference of Rome was about the regulate combined carriage by air and by rail when it learned that the Warsaw Conference of 1929 had taken the lead [53] and, strictly speaking, not only the Warsaw Conference, but also the International Air Traffic Association and the International Railway Union which already had entered into agreements on combined transportation.[54] The Conference preferred not to disavow them and, while the Warsaw Convention stipulated that, in cases of combined carriage, its own provisions "have to be observed as regards the carriage by air" (Art. 31), the principles of the Berne Convention were, at Rome, abandoned even as regards the carriage

[51] Above, note 26. [52] Of March 31, 1934; Hudson, Vol. VI, p. 818.

[53] Art. 31; Hudson, Vol. V, p. 115.

[54] Daniel Goedhuis, National Airlegislations and the Warsaw Convention, The Hague, 1937, p. 303.

by rail, without any really compelling reason, as a report of the League of Nations justly implies.[55]

Since the Conventions of 1933 went into force only eleven months before the outbreak of the war in Europe there has not been time enough to gauge the effects of these new and fargoing concessions to the carriers. European shippers anticipated them with some uneasiness, remembering the activities of the International Railway Transport Committee, a venerable body with frequently changing membership, which was never credited with too much respect for the spirit and letter of the Berne Conventions: This committee assumed the task of coördinating the "Supplementary Provisions" which most carriers include in their international tariffs in order to carry out certain rules of the treaties. To do that may be helpful and even necessary, and it is certainly entirely legal, as long as the text and spirit of the law are observed (Articles 9 and 61, 4 of the *C.I.M.*). And to provide for uniformity in these provisions seems undoubtedly worth while although it should be mentioned that nearly every one of the very numerous international railway unions (term used for railroads of different nationality which issue common tariffs) persists in formulating its own particular supplementary provisions to the Conventions.

That its coördinating efforts were not entirely successful should, perhaps, not be held against the Committee and is, at any rate, hardly as serious as its continuing attempts to legislate under the pretext of interpreting the Conventions—there being no doubt whatever that it is neither entitled to change the law nor called upon to construe it. In some specific cases, however, the carriers were, as has been remarked before, endowed with certain quasilegislative rights; these the Committee could have used in a liberal spirit; it could, e.g., have shortened the so-called delivery periods and would thereby not only have furthered international commerce but would also have strengthened the position of the railroads in their competition with other means of transportation. Yet it constantly failed to do just that.[56]

Now it may be admitted, as Dr. Ruth Masters points out,[57] that the Committee deserved well as regards the cause of unity among the European railroads, notably by establishing simple rules concerning their recourse against each other, but this happened many decades ago.[58] The most outstanding

[55] "The question arises whether this exemption in favor of the railroads is justified," remarks the Permanent Committee for Transport by Rail (Report on the Eighth Session 1935, League C.293.M.156.1935.VIII.). See also note 37, above.

[56] Cp. this writer's study on the Uniform Supplementary Provisions in *Zoll-, Speditions- und Schiffahrtszeitung*, Vienna, 1933, No. 6.

[57] Work cited above, note 1.

[58] Miss Masters speaks of the many ways in which the Committee simplified the relations between railroads participating in international shipments and quotes as an example the "question of liability" (p. 516). What she means is, of course, not the responsibility to the shipper (Art. 26f, *C.I.M.*), but the recourse of the railroads against each other. I do not doubt that she distinguishes clearly between the two notions, but some of the terms she uses could be easily misunderstood.

example of the Committee's practice in recent years is offered by its Supplementary Provision to Art. 10 (formerly 9) of the *C.I.M.* which reads:

> If on demand of consignor or in the absence of joint rates the freight charges have to be calculated separately for each line, this calculation shall be based, for each section, upon the tariff in force on the day on which the goods enter this particular section.[59]

Railroad classifications and railroad rates have frequently to be changed; they are, apart from other considerations, reduced to meet competition and, again, increased when competition ceases. These changes, e.g., of the Swiss rates, may enter into force after French goods destined for Zurich have been delivered to the railway at Paris. The Supplementary Provision would subject the shipments to the changed Swiss rates although each transport contract has obviously been concluded on the basis of the laws and tariffs which were legally in force on the day of the conclusion of this contract. When consequently an Austrian shipper challenged the validity of this Supplementary Provision the Vienna Commercial Court declared it null and void and the Austrian Suprême Court upheld this judgment.[60] But the Transport Committee was by no means impressed. It stuck and still sticks to its rule, knowing that few shippers are stubborn enough to fight for their rights and that the next one to do so, in Spain or in Greece maybe, need not be aware of the Austrian precedent which, anyway, would not necessarily influence the decisions of the Spanish or Greek courts.

Why were the railroads, which the Committee represents, so very fond of the work of the latter and why was that work, on the other hand, so severely condemned by commentators and courts alike? It seems to work equitably, after all, since it provides for the application not only of augmented, but also of reduced rates, if either increase or abatement occur while the goods are en route. The reason is simple and has something to do with the so-called delivery periods within which goods have to be tendered to the consignees. They are unbelievably long, even after their reduction by the last Conference,[61] but, as contained in Art. 11 of the *C.I.M.* they are only maxima which the railroads and their Committee would have been empowered to shorten, but which they consistently failed to revise.

The Berne Convention regards these delivery periods as units and if shipments are tendered before their expiration, most courts will not even admit the proof that they had been needlessly delayed en route. This gives cooperative (and not too scrupulous) carriers a good chance to raise each other's income and to practice a certain amount of unchallengeable discrimination.

[59] *B.T.I.* 1938, Annex, p. 4.

[60] Judgment of December 3, 1933; *B.T.I.*, 1934, p. 486. The Commercial Court quoted Otto Loening, the best known commentator on the Berne Convention (Goods) and this writer's article on the Supplementary Provisions (see note 56, above).

[61] Mark, a former railroad official, mentions in *B.T.I.*, 1934, p. 138, the example of oranges and lemons, carried from Jativa (Spain) to Breslau (Germany). The Convention of 1924 gave the carriers 41 (forty-one) days to cover the distance of 2735 km (about 1700 miles).

The whole thing may again be compared to a race. Winners are, in the case of raised rates, the goods which pass the junction before the raise enters into force and, considering the length of the delivery periods, the first carrier runs, usually, no risk if it holds back all or part of the transit freight until its neighbor's older and lower tariff is out of force. Conversely it may, in view of an impending reduction of the following carrier's rates, accelerate the carriage of all or of part of the transit shipments so as to subject them to this neighbor's not yet lowered rates. To do this was, of course, not general practice among the European roads, but there seems to be reason to believe that it has been done in certain cases.

This is only one instance, although an important one. Yet there are more than fifty Supplementary Provisions, very many of them "null and void," a fact of which the Transport Committee is, probably, not entirely ignorant. But the carriers continue to enforce them, unless checked by the courts, which does not happen too frequently. Although this is not exactly their line of business, more shippers would probably have been ready to have the legality of these provisions tested if they were not induced to think them entirely legal. A Swiss expert asked, years ago, "how a body of railroad men could be permitted to insert provisions into a law."[62] The Transport Committee is certainly not permitted to do exactly that. But it is true that the most widely known editions of the Conventions, namely those published by the railroads, contain both the treaties and the (partly illegal) Supplementary Provisions—with the latter items closely following the text of the articles to which they belong. This may be convenient for the shippers, but is certainly apt to confuse them. Furthermore, if not legal at the outset, these provisions are capable of becoming so at a later date, since the railroads never fail to present them to the revision conferences as extremely useful and practically indispensable. There is every reason to believe that even the Supplementary Provision to Art. 10 would be legal by now, had it not been for the strong objections of the Austrian delegates.

It would be entirely wrong, of course, to lay the blame for all this on the railroad men as individuals. Many of them were outstanding experts, although usually on very special matters only, which could not fail to narrow their outlook. But they were, above all, faithful servants of their employers, trained to fight the claims of shippers and passengers with tooth and claw, and they simply continued this fight in the international committees and conferences. The fault lies with a system which always favored the railroads and which finally went so far as to permit them to fix the extent of their own responsibility.

IV. *Necessary reforms—a task for the coming peace treaties*

It has been shown that the legislative efforts in the domain of transportation have been rather badly coördinated thus far, resulting in a regrettable waste of time, of money, and of man-power, even if the rules prepared by

[62] Ackerman, *La C.I.M.*, Geneva, 1932.

different sets of law-makers had been equally just and practicable. But this was not so. What the League proposed was, nearly always, equitable, but did not work, while the reverse was true in the case of the carriers' quasi-legislation. It could be enforced but was frequently far from being just. Nearly everything that, through legal regulations, can be done to further international transportation, namely, to assure its practicability (liberty of access and of transit, equitable rules on the calculation of freight charges), its simplicity (duty to accept international shipments, publicity of tariffs), its safety (collective responsibility of the carriers), and its speed (reduction of delivery periods) has been done within the framework of the Berne Conventions, and much more would have been done had it not been for the influence of the railroads over the conferences of revision.

It hardly needs to be said that the ravages of this war will make it all the more important to correct former mistakes and to push inevitable reforms. A common and progressive European—or rather Old World—law of transportation, which has been so very important in normal times, will be indispensable for the rehabilitation of the devastated countries. In a general way the authors of the peace treaties took notice of this necessity twenty-five years ago; Article 366 of the Treaty of Versailles and similar provisions in the other treaties testify to the importance which they attached to the Berne Conventions. But they did not even try to modernize the mechanism of these treaties or to rid it of the overwhelming influence of the carriers and they failed, on the other hand, to use it and the long experience gathered at Berne, preferring to set up a new and independent organism, well-meaning, but necessarily inexperienced.

In offering an outline of the necessary reforms it seems natural to start with improvements which normally could be attained through the existing mechanism of the Berne Conventions. In this category belong, above all, measures tending to further enhance the practicability, simplicity, safety, and speed of international transportation, especially acknowledgment of the shippers' right to the cheapest combined rates on the route chosen by the carriers, reëstablishment of the collective responsibility of the carriers in cases of overcharges, further reduction of the delivery periods and the simplification of certain all too involved rules (e.g. introduction of the simpler French system in cases of stoppage in transit). Everything should be done, on the other hand, to maintain and, if necessary, to restore the uniformity of the international regulations especially as regards the rules on combined transportation and on certain other matters which, instead of being included in the Convention on the Transport of Goods, have been left to the discretion of the carriers. Similarly ways and means ought to be found to make the application of the Convention on the Transport of Passengers and of Baggage independent of the good will of the railroads. As has been pointed out repeatedly in the course of this article a speedy solution of these problems can hardly be expected as long as the revision conferences, which theoretically

represent the Contracting Powers, are, in fact, dominated by majorities of railroad officials and, in addition, hampered by the intercompany agreements as described in Part III, about which the governments have practically nothing to say.

This statement and the whole distinction made between interstate conventions and intercompany agreements may surprise observers who are well aware of the fact that practically all of the major European railroads were government-owned at the outbreak of this war. This is an undeniable fact but it does not mean that the management boards of the roads became government agencies of the type of the departments of Commerce, the Interior, or Justice which are supposed to protect the interest of every citizen with equal impartiality. The railroads were, practically everywhere, expected to earn their own living, as it were, and to do this they were forced to compete with privately owned truck and navigation companies and, in the case of transit freight, with the railroads of foreign countries. This they did, stubbornly and, on the whole, with great skill, and since they were expected to act like commercial enterprises this writer would be the last one to reproach them for resorting to all the well known devices of commercial competition. He was not even surprised at the readiness shown by some of the state-owned railroads to grant the secret refunds of which the Berne Conventions severely disapprove (without, however, providing for any penalties in cases of violations of this rule). But the same devotion to their task which accounted for the good salesmanship of which many leading railroad men gave proof caused them to be very poor legislators. They were quite ready to do something (although not too much) for those of their customers whom they were afraid to lose to competing enterprises, but, as in the aforementioned case of the owners of private cars, distinctly unyielding with respect to other users. The state-owned railroads behaved, in other words, exactly like their privately owned forerunners all over the world, e.g. like the American railroads which, in their struggle for transcontinental freight charged higher rates from New York to Reno than from New York to San Francisco. This they did as rate makers, however, not as law makers, since the United States never was so inconsistent as to entrust the carriers with the legislative work which, basically, was destined to curb certain of their own activities.

Now it would not be fair to accuse Europe as a whole of having intentionally done just that. Most governments drew a very distinct line between the administrative and commercial tasks entrusted to the management boards of their railroads and the supervisory functions exerted by their railroad or commerce ministries. The latter often showed genuine good will and were ready to comply with reasonable wishes of the shippers, but could be relied upon to fulfil their promises only in the case of internal legislation which, after all, had to be enacted by the respective parliaments. Theoretically this is true for the Berne Conventions too, but practically there is

only the choice between ratification and non-ratification of the texts drafted by the revision conferences which in this kind of international legislation *de facto* supplant the legislative bodies of the Contracting Powers. Undoubtedly these international legislators are not just as free and independent as the elected representatives of the people are or should be. They may be bound, to a certain extent, by directives received from their governments, but so much must necessarily be left to their own judgment that their selection becomes a matter of prime concern.

Now the governments may seem to be entirely free in the choice of their delegates. But to think that they really are would mean to underrate the power of tradition and of expediency which struggle in favor of railroad men in preference even to government officials and especially to private experts, above all if they are known representatives of the shippers. When, on the occasion of the last revision conference, Hungary presented two delegates belonging to this last category, the majority seemed to resent it as an attack on the homogeneity of the Conference and hastened, afraid of another breach of a convenient tradition, to forestall the envisaged participation of the International Chamber of Commerce. It based its opposition on Articles 60 of the Berne Conventions which admit only delegates of the Contracting Powers. Therewith the Conference seems to have indicated the procedure to be followed: these articles will have to be changed. This could easily be done by using the pattern provided by the Constitution of the International Labor Organization according to which the Conferences of Representatives of the Members "shall be composed of four Representatives of each of the Members of whom two shall be Government Delegates and the two others shall be Delegates representing respectively the employers and the workpeople of each of the Members." [63]

This reform alone, however, would not suffice to safeguard the legitimate interests of international commerce and shipping. If it cannot be doubted that the railway interest was able to prevail in the Conferences of the Contracting Powers then it will easily be understood that it is paramount in bodies which consist exclusively of railroad men. This might be tolerable as long as these bodies deliberate and reach agreements on purely technical matters which do not bear on their relations to the shippers. But it ceases to be justifiable as soon as these meetings are permitted to assume true legislative functions, either through express delegation, as in the cases of combined transportation and of certain exempt traffic, or through the tacit acquiescence of the governments (case of the Supplementary Provisions published by the International Railway Transport Committee). It will be, in the long run, a distinct advantage for the carriers themselves if the shippers are admitted to deliberations and decisions about matters in which they are just as interested as the carriers, and where their broader commercial experience might be very helpful.

[63] Constitution of the International Labor Organization, Art. III; Hudson, Vol. I, p. 228 f.

As has been said before, these improvements could, normally, be attained by means of the existing mechanism of the Berne Conventions, namely through the revision conferences. But it also has been pointed out that, taking into account the five year periods according to Articles 60 of both Conventions and the customary slowness of the ratification, the amended treaties could hardly be expected to come into force before ten years after the end of the war, an entirely unsatisfactory prospect if one considers the subject of this legislation.

It has, therefore, long since been proposed to create a permanent legislative body, comparable in certain respects to the Administrative Conferences provided for by the International Postal Conventions [64] or to a "Commission of Experts" with broader powers. It may seem doubtful whether this new organism should replace the revision conferences altogether or only as far as certain less essential rules are concerned, but it seems certain that it could, very advantageously, take over the functions of the Commission of Experts and of the Railway Transport Committee. Clearly the shippers would be entitled to equal rights with the carriers and, on the side of the carriers, the truck, navigation, and air lines, to a number of representatives corresponding to the importance of their international business. It would furthermore be very helpful, to say the least, if this new body, aided by the Central Office, which would act as its Secretariat, could take over all or certain of the functions of the Communications and Transit Section and of the Advisory and Technical Committee of the League.

Although the writer has tried to indicate what he considers the basic features of the necessary reforms he had, for obvious reasons, to refrain from offering a wealth of detailed suggestions comparable to the ones laid before the last revision conference where the Contracting Powers alone proposed more than a thousand modifications of the Conventions. He thinks, however, that a thoroughgoing survey of all the complicated details of the matter constitutes an indispensable prerequisite to a speedy reform of lasting value and that this survey should start as soon as possible. For it would be a serious mistake, in his view, to rely again on the slowly working mechanism provided for by the Berne Conventions. All the major reforms, above all the ones destined to speed up the procedure of revision, would have to be included in the Peace Treaties and it seems obvious that this cannot be done without being based on careful preparatory work.

To lay this groundwork would, certainly, be no easy task even if it could be confined to the exigencies of European railroad traffic. This will not be the case, however. Inside of Europe combined transportation will play a very big part. This trend, noticeable before the war, will be much more accentuated after its conclusion, on account of the necessity of a wisely planned reconstruction. This work, which necessarily includes the rebuilding of destroyed and impaired means of transportation, will be very costly in any

[64] Chamberlain, p. 488.

event. It would be rather extravagant, therefore, to rebuild and to restock railroad lines the local traffic of which can be taken over by truck companies, by interior or coastwise navigation, or by a combination of different services of transportation. It becomes, consequently, more important than ever to extend the benefit of uniform and progressive rules to shipments (and to passengers) that have to use different means of carriage in order to reach their destination.

Furthermore, not only Europe and the needs of its commerce will have to be considered. It will not suffice to base the reform on European laws, the jurisprudence of European courts and on European rate practice alone. The problem has long since ceased to be a merely European or even Old World question. Many European railroad tariffs, foremost among them those created to further the seaports of the different continental countries, are of vital interest to overseas trade. In the question of combined transportation by air and by rail the Conventions of Berne and of Warsaw will have to be adjusted to each other;[65] but aërial navigation is global and the United States as well as some other countries of this hemisphere are parties to the Warsaw Convention.

Since even greater interests are at stake now than were at issue in 1919, it would be even costlier to repeat the mistakes made at that time. In addition, the failure of twenty-five years ago could be explained by pointing to the comparatively short time within which the Peace Conference had to settle new and rather involved questions. But, although some of the problems to be faced now are even more intricate, a similar excuse would not stand this time, after the experiences of the last decades, with the war still going on, and with a certain number of experts at hand to do the indispensable preparatory work.

[65] *B.T.I.*, 1937, p. 332 (Coördination Air—Rail, Report by Henning).

THE FRANCO-LEBANESE DISPUTE AND THE CRISIS OF NOVEMBER, 1943

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I. *The Background*

Upon the collapse of France and the signing of the Franco-German Armistice on June 22, 1940, there were rumors that military and naval bases in Syria and the Lebanon might be used by Germany against France's former ally, Great Britain. In a broadcast from Beirut the French High Commissioner and the Commander-in-Chief of the French Forces in the Levant, General Mittelhauser, thereupon declared, that hostilities had ceased in Syria and the Lebanon and denied any thought of handing over bases to the Axis Powers. On July 1, 1940, Great Britain, following General Mittelhauser's declaration, made clear her position with regard to Syria and the Lebanon in the following terms:

> His Majesty's Government assume that this does not mean that, if Germany or Italy sought to occupy Syria or the Lebanon and were to try to do so in the face of British command of the sea, no attempt would be made by the French Forces to oppose them. In order, however, to set at rest doubts which may be felt in any quarter, His Majesty's Government declare that they could not allow Syria or the Lebanon to be occupied by any hostile Power, or to be used as a base for attacks upon those countries in the Middle East which they pledged to defend, or to become the scene of such disorder as to constitute a danger to those countries. They therefore hold themselves free to take whatever measures they may in such circumstances consider necessary in their own interests. Any action which they may hereafter be obliged to take in fulfilment of this declaration will be entirely without prejudice to the future status of the territories now under French mandate." [1]

For a short time no Axis attempts were made against Syria or the Lebanon but gradually Axis influence increased and the French administration became more subservient. The Vichy Government recalled General Mittelhauser and an Armistice Commission, composed of Germans and Italians, was sent to Syria and the Lebanon to advise the mandatory administration, to take over aerodromes and aircraft, and to supervise the demobilization of the French army in the Levant.[2] This led to dissatisfaction and many officers might have joined General Charles de Gaulle, leader of the Free French, if the Vichy Government had not decided to take a firm stand by

[1] Keesing, Contemporary Archives, Vol. IV (1940), p. 4125.

[2] Ikbal Ali Shah, "Will Syria Join the Axis?", The Nineteenth Century and After, Vol. CXXIX (1941), p. 63.

sending out General Dentz as the new High Commissioner for the purpose of suppressing any such movement.

Nor was this all. British subjects were not allowed to pass through Syria or the Lebanon from Palestine. This made it more difficult for Great Britain to maintain her connections with her ally, Turkey. The change in the situation had also led 6,000 Polish troops with the French Forces in Syria to leave the area and they eventually joined the British Forces in Palestine. A section of the French Foreign Legion followed in the footsteps of the Polish troops.[3]

During Rashid Ali's revolt in Iraq in May, 1941, the French authorities in Syria sent armaments to Iraq, upon the advice of the Armistice Commission, to support the Rashid Ali Government against Great Britain. When the Rashid Ali régime collapsed, the Germans felt their position in Syria and Persia growing weaker. Thereupon the number of German "visitors" in Syria and the Lebanon was increased and military materials were poured in. The Germans were probably planning to control these countries by infiltration, as they had done in Bulgaria.[4]

Great Britain had already replied by preventing the French authorities in the Levant from any possible use of the Syrian, or northern, branch of the Mosul pipe-line. Thus Iraqi oil was transmitted only through the Palestinian, or Southern, branch.[5] Moreover, the blockade had been extended to the Lebanese coast, while Syria's commercial relations with Palestine and Iraq were suspended. Finally Great Britain, with the collaboration of the Free French, decided to put an end to German designs on Syria and the Lebanon in order to avoid the threat of Axis control of these countries.[6] Military operations began on June 8, 1941, and continued until July 11, 1941, when an Armistice was signed between the Vichy authorities in the Levant and the occupying authorities. The terms of the Armistice Convention, which included 22 points, covered matters relating to the repatriation of French Forces, the surrender of arms, the release of prisoners, notification to

[3] Norman Bentwich, "The War comes to Syria and Palestine," The Nineteenth Century and After, Vol. CXXVIII (1940), pp. 260–1.

[4] See Mr. Churchill's statement to the House of Commons, July 15, 1941, reprinted in Charles Eade's compilation of Mr. Churchill's war speeches entitled The Unrelenting Struggle, London, 1942, pp. 1946–7.

[5] The Mosul (or rather the Kirkuk) oil in Iraq is carried by one line to a point in the desert called al-Haditha, after which the line divides into two branches, the Northern ending in Tripoli in the Lebanon, and the Southern at Haifa in Palestine. See an excellent article on how the project of two lines originated by Sir Henry Dobbs, "Mosul Oil and the Pipe-Line," The Nineteenth Century and After, Vol. CVIII (1930), pp. 281–291.

[6] The Vichy Government protested against the British action by sending a note on June 9, 1941, in which it was stated that nothing in the situation of Syria and the Lebanon could explain the British attack, and asserted that there had been no collaboration in that area with the Germans. Great Britain's reply to the Vichy note declined to accept its definition of the word collaboration and said that the British action was based on the facts of the case rather than on theoretical considerations.

the Occupying Authorities of minefields at sea and on land, and other minor points.[7]

Various factors assisted the British military operations. The situation in Syria and the Lebanon had become intolerable owing mainly to the blockade and the interruption of commercial relations with neighbouring countries. Moreover the French Government had failed, ever since 1936, to live up to the pledge of independence which had been given to Syria and the Lebanon in the unratified treaties of that year, M. Bonnet having refused to bring the treaties before the Senate for approval.[8] This action had; no doubt, undermined the position of the nationalist elements in Syria and the Lebanon, who consequently ceased to coöperate with France. Thus the French position in the Levant became untenable. But the High Commissioner, instead of attempting to win the confidence of the population, resorted to more drastic measures. He suspended the constitutions of Syria and the Lebanon, dissolved their Chambers, and declared permanent the French mandate over Syria and the Lebanon.[9] Such high-handed action and the failure of the French Government to live up to its pledges turned the sympathies of the Syrian and the Lebanese population in favor of the new liberators. General Catroux, on the morrow of the attack on Syria and the Lebanon, proclaimed the independence of these two countries. Finally, Turkey, an interested neighbouring state, looked with satisfaction on the British action, fearing that German seizure of Syria would lead to German encirclement of her territory.

The British and the Free French armies were generally very well received by the Syrian and the Lebanese populations, owing not only to dissatisfaction at the maintenance of the French mandate, but also to the fact that Great Britain and her ally proclaimed the independence of both Syria and the Lebanon, lifted the blockade and reopened commercial relations with the neighbouring countries and with the countries of the sterling bloc.

II. *The Declaration of Independence and the New Government*

When the attack was launched on the French authorities in Syria and the Lebanon on June 8, 1941, General Catroux, in the name of General de Gaulle, issued a proclamation to the Syrians and the Lebanese declaring that Free France had terminated the mandate and granted independence both to Syria and the Lebanon. The text of the proclamation follows:

> Syrians and Lebanese: at the moment when the forces of Free France, together with the forces of the British Empire, her ally, penetrate your territory, I undertake to assume the powers, the responsibilities, and the duties of the representative of France in this part of the Levant in the

[7] See text of the Armistice Convention in The Iraq Times, July 16, 1941.

[8] See text and a discussion on the Franco-Syrian Treaty in Marcel Homet, *L'Histoire Secrète du Traité Franco-Syrien*, Paris, 1938; on the Franco-Syrian and Franco-Lebanese Treaties see Arnold J. Toynbee, Survey of International Affairs, 1936 (London, 1937), pp. 748–767.

[9] Ikbal Ali Shah, work cited, p. 62.

name of Free France, which identifies itself with the traditional and authentic France, and in the name of its leader, General de Gaulle.

In this capacity, I come to put an end to the régime of the mandate, and to proclaim you both free and independent. From now on you will be a sovereign and independent people, and you are at liberty either to constitute yourselves in separate states or to unite together in one state. In either case your status of independence and sovereignty will be guaranteed by a treaty in which our mutual relations will be fully defined. This treaty will be negotiated as soon as possible between your representative and myself. While awaiting its conclusion our mutual relations will be those of allies firmly united in the pursuit of an ideal and common ends.

Syrians and Lebanese: you will understand from this declaration that if the Free French and British Forces cross your frontiers it is not to suppress your liberty; it is rather to guarantee that liberty. It is to drive the forces of Hitler from Syria. It is to prevent the Levant from becoming an enemy base directed against Britain and ourselves. We who fight for the liberty of the nation cannot allow the enemy, having gradually subdued your land, to seize control of your persons and your property and to make slaves of you. We will not allow people whom France has promised to defend to be delivered into hands of the most ruthless master history has ever known. We will not allow the material interests of France in the Levant to be taken over by the enemy.

Syrians and Lebanese: If, in response to my appeal, you rally to our side, I would have you know that the British Government, in agreement with Free France, is prepared to confer upon you all the advantages enjoyed by the free peoples with whom it is associated. Thus the blockade will be lifted and you will enter immediately into relations with the sterling bloc, which will be of inestimable benefit to your import and export trade.

Syrians and Lebanese: France declares you independent by the voice of those of her sons who fight for her life and the liberty of the World.[10]

Following this proclamation Sir Miles Lampson, His Britannic Majesty's Ambassador to Egypt, endorsed the proclamation of General Catroux on behalf of his Government and issued from Cairo the following confirmation:

> General Catroux, on behalf of General de Gaulle, Chief of the Free French, has issued a declaration to the people of Syria and the Lebanon before advancing with the object of expelling the Germans. In this he declares the liberty and independence of Syria and the Lebanon; he undertakes to negotiate a treaty to secure these objects. I am authorized by His Majesty's Government in the United Kingdom to declare that they support and associate themselves with the assurance that, should you support and join the Allies, His Majesty's Government in the United Kingdom offer you all the advantages enjoyed by free countries who are associated with them. Thus the blockade will be lifted, and you will enter into immediate relations with the sterling bloc, which will give you immediate and enormous advantages from the point of view of your exports and imports. You will be able to sell your products and to buy in all free countries.[11]

[10] The Times, London, June 9, 1941; official text in *Journal officiel de la République Syrienne, No. 40 bis* (October, 14, 1941), p. 1.

[11] The same.

Great Britain had, as a matter of fact, already made known her intention to support Syrian and Lebanese aspirations for independence. As early as May 29, 1941, Mr. Eden, the Foreign Secretary, in a speech in the Mansion House, had made the following statement:[12] "Some days ago I said in the House of Commons that His Majesty's Government had great sympathy with Syrian[13] aspirations for independence. I should like to repeat this now. . . ."[14]

While Great Britain declared her support of Syrian and Lebanese independence, it was made clear in the meantime that her sole interest in the Syrian campaign was to win the war and by no means to supplant France or substitute British for French interests in Syria and the Lebanon. The special position of France in Syria and the Lebanon was agreed upon between Great Britain and Free France by an exchange of letters between General de Gaulle and Mr. Lyttelton, Great Britain's Minister of State in the Middle East, on August 15, 1941. The following is the text of Mr. Lyttleton's letter to General de Gaulle:

> At the conclusion of our talk today I am happy to repeat to you the assurance that Great Britain has no interest in Syria or the Lebanon except to win the war. We have no desire to encroach in any way upon the position of France. Both Free France and Great Britain are pledged to the independence of Syria and the Lebanon. When this essential step has been taken, and without prejudice to it, we freely admit that France should have the predominant position in Syria and the Lebanon over any other European Power. It is in this spirit that we have always acted. You will have seen recent utterances of the Prime Minister in this week. I am glad to reaffirm those words to our friends and allies, who have our full sympathy and support.
>
> On our side, I am happy again to receive your assurances of the determination of Free France, as friend and ally of Great Britain, and in accordance with the agreements and declarations which you have already made, to pursue relentlessly to the finish the war against the common enemy. I am happy that we should thus reaffirm our complete understanding and agreement.

General de Gaulle's reply follows:

> I have received the letter which you have been kind enough to send me following our interview of today. I am happy to note your renewed assurances regarding the disinterestedness of Great Britain in Syria and

[12] The Times, London, May 30, 1941.

[13] The Lebanon was of course implied in the term "Syria."

[14] Mr. Eden referred to Syria in the House of Commons again on May 15, 1941, in answer to a question raised by Mr. Gallacher (Fife, West) in the House of Commons:

"Mr. Gallacher asked the Secretary of State for Foreign Affairs whether he would make a statement on the present position in Syria; and whether it was the intention of His Majesty's Government to endeavour to secure complete self-government for the Syrian people.

"Mr. Eden: I presume that the question refers to the internal constitutional position in Syria. My information is that the recent changes in the constitution introduced by the French High Commissioner a month ago have been well received. These changes were warmly welcomed by His Majesty's Government, who have always had great sympathy with Syrian aspirations for independence."

> Lebanon, and the fact that Great Britain admits as a basic principle the preëminent and privileged position of France when these countries shall have attained independence in conformity with the undertaking which Free France has given.
>
> I take this opportunity of repeating that Free France, that is to say, France, is resolved to pursue the war on the side of Great Britain, her friend and ally, until the attainment of complete victory against our common enemies.[15]

On September 9, 1941, Mr. Churchill, in his speech on the war situation in the House of Commons reiterated and endorsed the principles agreed upon between General de Gaulle and Mr. Lyttelton with regard to the declaration of Syrian and Lebanese independence and the special position of France in the Levant. Mr. Churchill's statement is of particular interest in connection with the position of Syria and the Lebanon and deserves to be quoted in full:[16]

> This is the point at which it will be convenient for me to explain our position in Syria. We have no ambitions in Syria. We do not seek to replace or supplant France, or substitute British for French interests in any part of Syria. We are only in Syria in order to win the war. However, I must make it quite clear that our policy, to which our Free French Allies have subscribed, is that Syria shall be handed back to the Syrians, who will assume at the earliest possible moment their independent sovereign rights. We do not propose that this process of creating an independent Syrian Government, or Governments—because it may be that there will not be only one Government—should wait until the end of the war. We contemplate constantly increasing the Syrian share in the administration. There is no question of France maintaining the same position which she exercised in Syria before the war, but which the French Government had realized must come to an end. On the other hand, we recognize that among all the nations of Europe the position of France in Syria is one of special privilege, and that in so far as any European countries have influence in Syria, that of France will be preëminent. That is the policy which we have decided to adopt. We did not go there in order to deprive France of her historic position in Syria, except in so far as is necessary to fulfil our obligations and pledges to the Syrian population. There must be no question, even in wartime, of a mere substitution of Free French interests for Vichy French interests. The Syrian people are to come back into their own. This is fully recognized in the documents which have been exchanged between the Minister of State and the representatives of the Free French.

The declaration of independence for the Lebanon was officially announced by General Catroux at Beirut on November 26, 1941, in the name of Free France.[17] It was immediately recognized and endorsed by General de

[15] The Times, London, Aug. 16, 1941.

[16] Eade, as cited, p. 250; Parliamentary Debates, House of Commons, Vol. CCCLXIV (1941), p. 76.

[17] The Times, London, November 28, 1941; *Journal officiel de la France libre*, December 13, 1941, p. 52. General Catroux had proclaimed the independence of Syria at Damascus on September 27, 1941: *Journal . . . Syrienne*, as cited, pp. 8–9.

Gaulle,[18] Mr. Eden, Mr. Lyttelton, Sir Miles Lampson, General Sir H. M. Wilson, and Sir Edward Spears.[19]

It remained for the Lebanon to reorganize its internal affairs and to establish a truly representative Government under the new régime. This was no easy task in a country whose complex religious and racial elements sharply affect its politics. It has taken more than a year to reach a final compromise. The first attempt, tried by Ayyub Thabit in 1942, did not work. But the appointment by General Catroux of Alfred Naqqash as a President of the Republic to help carry out the elections proved to be quite successful. From the outset the people realized that elections would be free, since they were supervised by the Occupying Authorities. This encouraged the ardent nationalists, who in the past would not have thought it worth their while to become candidates for election, to enter the campaign and encouraged them to make every effort to win. The *Times'* correspondent in the Middle East thus described the situation [20]: "For the first time in the long history of this mountain refuge the country had produced a national policy which, at least for the time being, seemed to bind together all elements, Christian and Moslem, of the extraordinary mosaic within its borders. Elections were begun in the middle of August, 1943, and were completed within a fortnight. Votes were openly bought and sold; but were free in the sense that they were not "controlled," as they used to be, by the then existing Government. The outcome of the elections was widely interpreted as a heavy setback for French prestige, since only a few of those who were ardently pro-French succeeded in the elections; and the majority were followers of Shaikh Beshara el Khouri who called themselves the "Constitutionalists."

The Chamber of Deputies met on September 21, 1943, for the election of the President of the new régime. There was great excitement among the people during the first meeting of the Chamber which "demonstrated the nation's awakening to political development in their independent state." [21] The Chamber of Deputies elected Shaikh Beshara el Khouri President of the Republic by a majority of forty-four out of fifty-five votes.[22] The new President delivered an optimistic speech, declaring his gratitude for the confidence of the nation, and spoke of the Lebanon's love of freedom and its

[18] General de Gaulle paid a visit to Syria and the Lebanon at this time; while passing through Beirut, capital of the Lebanon, on July 27, 1941, he was received with great enthusiasm and hailed as the liberator of the Lebanon. General de Gaulle confirmed the declaration of General Catroux in his speeches and conversations before the notables and religious leaders and politicians whom he met in Beirut.

[19] W. W. Astor, "The Middle East and the War," Journal of the Royal Central Asian Society," Vol. XXX (1943), p. 137.

[20] The Times, London, November 15, 1943.

[21] The Eastern Times, Beirut, September 22, 1943.

[22] Shaikh Beshara el Khouri comes from a Maronite Christian family who have played an important role in Lebanese politics. He is a distinguished lawyer, had been a Minister of Interior in 1926, in the first Lebanese Cabinet, and Prime Minister several times later. He is pro-nationalist and willing to coöperate with the nationalist bloc of the Syrian Republic.

future as a sister state of its neighbouring states of the Middle East. He also spoke of the necessity of collaboration with the Allies.[23]

President Khouri invited Riadh al Sulh, leader of the Constitutionalist group, the majority party in the Chamber of Deputies, to form the first cabinet of the new régime on September 26, 1943. While the members of the cabinet represented the various religious communities, they all professed to be "nationalists" and members of the same political party. Prime Minister Riadh al Sulh laid down the programme for his cabinet in a long speech which he delivered in the Chamber of Deputies on October 7, 1943. The programme was an exceedingly ambitious one, but in fact he expressed what the people of Lebanon really wanted from a truly representative Chamber. The programme promised extensive and sweeping reforms in the administration of the Government, in the transformation of the form of the Government from a mandatory into an independent and self-governing institution, economic and social reforms, hygienic and cultural development. It likewise dealt with the ways and means of making the Government truly national and independent. Thus the programme laid down certain specific matters which would be immediately considered, such as the use of the Arabic language alone in the various departments of the Government, the amendment of the Constitution and the Electoral Law, and the establishment of foreign relations with the other powers, including France, on the basis of equality.[24]

The Lebanese Government with much enthusiasm quickly started to carry out its proposed reforms. In this the Government was wholeheartedly supported by public opinion and encouraged to exercise its rights of self-government by Great Britain and the United States. Having been promised that the mandatory régime had come to an end, the Lebanese Government acted on the assumption that the representative of the French National Committee, M. Jean Helleu, need not be consulted any more on matters strictly Lebanese in character. Furthermore, the Government wanted to settle matters of urgent importance to the Lebanese Government. Some of the Cabinet Ministers, such as Camille Shamoun, Minister of the Interior, and Adil Ussayran, Minister of Supply, are the most enthusiastic and the most extreme in demanding the fulfilment of Lebanese self-government in name as well as in fact. The Prime Minister, however, declared that he was not going to ask the impossible. Large powers, he declared, must remain in the hands of the Allies for the duration of the war; and anything connected with military security and the harbor of Beirut could clearly not be handed over to the Lebanese Government. But the Prime Minister and his Cabinet insisted that the so-called funds of common interest (consisting of custom receipts, harbor dues etc.), adoption of a national flag, use of the Arabic language alone in the departments of the Government, and the demand that the Delegate-General should be reduced

[23] The Eastern Times, September 22, 1943.

[24] See text of the Premier's speech in Sawt al-Ahrar (Beirut), October 9, 1943.

to the status of a diplomatic representative should be settled as soon as possible and need not be postponed until the war was over.[25] The local French authorities, however, have shown increasing reluctance to give up their powers and rights as stipulated in the Mandate, until the Mandatory System is replaced by a treaty between France and the Lebanon. The Lebanese Government, on the other hand, refused to admit for the French the same position as that of a Mandatory Power. The extremists declared that "they were determined to make the issue a challenge to the United Nations, a test of the Atlantic Charter." [26]

The situation in the Lebanon, immediately after the proclamation of independence, was not very clear from the legal point of view. Various forces came into play to influence the future status of the Lebanon and there was much confusion among these forces. Political actions moved far ahead of law. Thus the legal complex in which the Lebanon found itself involved was left without a serious attempt to settle it.

Three main forces influenced the situation in the Lebanon and are still influential in determining the country's destiny. There is, in the first place, the Nationalist Group, whose influence had become predominate after it had won a majority in Parliament. This party advocates independence for the Lebanon, opposes the Mandate, and pledges coöperation with the other Arab countries. Secondly there are the military authorities, representing in the main Great Britain's influence, since the British forces are in charge, with the Free French, of the military occupation of Syria and the Lebanon during the war. This second force is in sympathy with the nationalist aspirations for self-government and independence, as had been already promised.

Finally, there are the French authorities who still considered themselves charged with the Mandatory obligations, and as such can give "advice" to the Lebanese Government. The French National Committee had already committed itself to terminate the Mandate and grant independence, but such a stage had not yet been reached. From the French point of view, therefore, while they promised independence, they considered themselves formally the authorities charged with the special position of a Mandatory Power, pending the termination of the Mandate through legal channels. Such reluctance on the part of the French to give up their powers had naturally induced the nationalist group to count on Great Britain's support, as well as the moral support of the United Nations, who adhered to the principles of the Atlantic Charter, for ensuring the independence of the Lebanon. On the other hand, the avowed spirit of coöperation on the part of the Lebanese Government with the other Arab countries and its declaration that the Lebanon would take part in the proposed Cairo Conference aroused great enthusiasm in the Arab World to support the Lebanon's aspirations.

The French authorities, however, may look with apprehension at any movement on the part of Syria or the Lebanon to join an Arab union, and

[25] The Times, London, November 15, 1943. [26] The same.

would certainly try to obstruct it particularly in the Lebanon, fearing that such a movement would mean the end of French influence in the Levant. Great Britain's support of an Arab union had undoubtedly induced the French to come to the conclusion that Great Britain wanted to dominate Syria and the Lebanon. During Mr. Willkie's short visit to Syria, General de Gaulle had time to discuss with him the situation in Syria and referred to a "struggle between the British and the Fighting French to dominate Syria." When General de Gaulle was reminded by Mr. Willkie that Syria was a mandated territory under the League of Nations, he said:

> Yes, I know. But I hold it in trust. I cannot close out that Mandate or let anyone else do so. That can be done only when there is a Government again in France. In no place in this world can I yield a single French right, though I am perfectly willing to sit with Winston Churchill and Franklin Roosevelt and consider ways and means by which French rights and French territories can be momentarily and temporarily used in order to help drive the Germans and the collaborators from the control of France.[27]

The disinterested observer may regard the situation from many angles. From the internal, or Lebanese, point of view, it may be said that the Lebanese naturally wanted to avail themselves of the pledges of independence given to them, and not unnaturally counted on a rivalry, or a supposed rivalry, between the British and the French to ensure that independence. From the diplomatic point of view, Great Britain is considered a pro-Islamic and pro-Arab Power. She is therefore bound to take into consideration the national aspirations of the Arabs. The Arab countries long ago aspired to form a union or federation. Such a programme would not come into conflict with Great Britain's main interests in the Near East; rather it was declared, through Great Britain's Foreign Minister, that "His Majesty's Government will give full support to any scheme "that the Arabs desire for a "greater degree of unity than they now enjoy." [28] Such support from Great Britain

[27] Wendell L. Willkie, One World, New York, 1943, p. 11. In a letter to the League of Nations dated November 18, 1941, General De Gaulle had said: "The independence and sovereignty of Syria and the Lebanon will . . . not affect the juridical situation as it is established by the mandate." He added that "this juridical situation could not be changed without consent of the League Council, agreement of the United States—party to the Franco-American treaty of April 4, 1924—and conclusion of a treaty by France with the Syrian and Lebanese Governments." Philip W. Ireland, ed., The Near East, Problems and Prospects, Chicago, 1942, p. 235.

[28] See Mr. Eden's Mansion House speech of May 29, 1941. The full statement concerning the Arab Union follows: "The Arab World has made great strides since the settlement at the end of the last war, and many Arab thinkers desire for the Arab peoples a greater degree of unity than they now enjoy. In reaching out towards this unity they hope for our support. No such appeal from our friends should go unanswered. It seems to me both natural and right that the cultural and economic ties between the Arab countries, yes, and the political ties, too, should be strengthened. His Majesty's Government, for their part, will give their full support to any such scheme that commands general approval." The Times, London, May 30, 1941, p. 2.

would certainly make her more popular in the Arab World, to the disadvantage of France and French interests in Syria and the Lebanon. For such a scheme would probably reduce to a minimum, if not entirely eliminate, French influence and prestige in the Levant.

III. *The Crisis*

Permanent inner conflict was bound to come to an open clash; the French, moreover, did not always avoid the use of violence in colonial matters even when they could. In Syria such a method had ample precedent.[29]

The Clash occurred on the question of amending the Organic Law. The Riadh al Sulh Cabinet had already declared its intention to amend the Organic Law in order to eliminate those articles dealing with the relations of the Lebanon, as a mandated territory, with the League of Nations and the Mandatory Power. Early in November, 1943, the Cabinet prepared a draft amendment and decided to bring it before the Chamber of Deputies. The French authorities contended that such an amendment could be carried out only after consultation with, and approval by, the representative of the French National Committee, M. Jean Helleu, who held the position of Ambassador of France, Delegate General and Plenipotentiary. The Lebanese Cabinet being reluctant to accept such advice, the French authorities declared on November 5, 1943, in the Beirut newspapers, that the question of amending the Organic Law had been discussed by the French National Committee;[30] the following statement was communicated for publication:[31]

> The French National Committee discussed the question whether the Lebanese Cabinet and the Chamber of Deputies could act alone with regard to the amendment of the Lebanese Organic Law. It was decided by the National Committee that in so far as France had undertaken international obligations, which are still valid, such obligations, therefore, could not be altered save with the approval of the National Committee.
>
> The French National Committee deemed it necessary now to make such a declaration in accordance with its international obligations, since respect to international obligations is the basis of the freedom and independence of states. The National Committee is sure that the Lebanese Nation will acknowledge such rights and can see that such obligations do not contradict France's decision to grant the Lebanon its complete independence through cordial and friendly negotiations which attached both countries together in the past, as it should prevail now.

In reply to this declaration the Lebanese Prime Minister, Riadh al Sulh, made to the press the following statement:[32]

[29] See Quincy Wright, Mandates Under the League of Nations, Chicago, 1930, p. 577; also Majid Khadduri, The Syrian Question, Mosul, 1934, pp. 91, 106, 111.

[30] M. Jean Helleu was in Algiers a week before the crisis and discussed the demands of the Lebanese Government fully with the Committee. It is held that he was granted full powers by General de Gaulle to deal with the situation (The Times, London, November 15, 1943, p. 4).

[31] This statement was published in all the Beirut papers and in the Egyptian newspaper al-Ahram on November 7, 1943.

[32] The same.

> The Lebanese Cabinet met this afternoon and considered the French declaration. It was decided that, according to article 76 of the Organic Law,[33] the power of amending the Organic Law belongs to the Lebanese Government. On that basis the Cabinet decided to bring to the Chamber of Deputies, in fulfilment of its programme, a draft law for the amendment of those articles which do not fit with the independence of the Lebanon, already recognized.

The Franco-Lebanese controversy over the question of amendment had been discussed in the Chamber of Deputies and in the press. Some papers advocated conciliation and pointed out that the dispute was only a question of procedure rather than of principle. In the Chamber of Deputies there was a similar discussion; but the majority of the members supported the Government's point of view.

On November 6, 1943, the Cabinet met and passed a resolution on the final form of the draft amendment law which the Cabinet decided to bring to the Chamber of Deputies. It was rumored that the meeting lasted six hours (5–11 P.M.) and prepared a draft amendment law of six pages. Articles 1, 2, 3 and 95 were altered in order to omit those clauses dealing with the Mandatory Power and the League of Nations; articles 90, 91, 92, 93 and 94 were omitted altogether because they dealt with the rights and duties of the Mandatory Power, admission to the League of Nations, and the Lebanon's foreign relations as a mandated territory.

On November 8, 1943, the Chamber of Deputies held a meeting and approved the amendment by a great majority. Public opinion, as represented by the press, was in favor of the amendment and demanded that the independence of the Lebanon be ensured.

The French authorities promptly reacted by taking drastic measures; the measures were indeed so violent and repulsive that they shocked all Arab countries and aroused the sympathies of the United Nations. On November 8, 1943, the President of the Republic, Shaikh Beshara al Khouri, the Prime Minister, Riadh al Sulh, and two other Ministers, were arrested. Later all the Lebanon Cabinet Ministers, with one exception, and the 48 members of the Chamber of Deputies who voted for the amendment, were arrested.

M. Jean Helleu, the French Delegate General, broadcasting from Beirut, denounced the action of the Lebanese Government and called it a "plot against France." He declared that he had invited Emile Idde, a former Prime Minister, to form a new Government and organize new elections, following the fall of the Cabinet and the dissolution of the Chamber of Deputies.[34]

[33] Article 76 stipulates that "the Organic Law may be amended by a proposal of the President. The Chamber of Deputies shall consider such a proposal as presented through an amendment draft law."

[34] It was alleged that M. Helleu made use of Senegalese troops and tanks in carrying out his orders. M. Helleu later denied the use of Senegalese troops but it is reported that tanks were seen in the streets of Beirut.

The action of the French authorities produced an avalanche of protests from every quarter. Public opinion in the Lebanon rose against the French authorities and the excitement reached a high pitch; the demonstrations led to a clash with the French forces. The situation became so tense that a revolt might have swept the country had it not been for the circumstances of war and the existence of foreign military forces in Syria and the Lebanon.[35] Protests were made to the French and British authorities in the Lebanon by both Muslim and Christian leaders and prelates.

Other Arab countries strongly supported the Lebanese case. The Egyptian Prime Minister, Mustafa Nahas Pasha, cabled to General de Gaulle, on November 11, 1943, strongly protesting against the arrest of the Lebanese leaders. He threatened that Egypt might revise its attitude towards the French National Committee if the situation in the Lebanon was not restored to normal. He sent similar protests to the representative of the French National Committee in Cairo, and to the Ministers of the United States and of Great Britain in Egypt.[36] The Iraq Government addressed similar protests to the French authorities and to Great Britain. King Abdul Aziz Ibn Saud sent a strong protest to Mr. Churchill.[37]

Great Britain and the United States expressed great sympathy with the Lebanon. The British Minister at Beirut, Sir Edward Spears, addressed a protest to the French authorities against the action and added that the British authorities had not been consulted. The Minister of the United States at Beirut addressed a similar protest to the French authorities. The British point of view was best expressed by Mr. Roger Makins, who, in the absence of Mr. Harold Macmillan, the Resident Minister at Algiers, saw General de Gaulle and M. Massigli, the Commissioner for Foreign Affairs, and declared that "Great Britain's deep concern in the Lebanese crisis arose from two bases. First, we had associated ourselves with the French promise of independence in 1941 and could not therefore see Lebanese rights overthrown. Secondly, Lebanon was part of a vitally strategic area, and we could not afford the risk of popular disturbances." [38]

Under such diplomatic pressure, the French National Committee took energetic action. The Committee, after consideration of the situation, declared (on November 13, 1943) its intention "to see established in Leb-

[35] The French press in Algiers, however, depicted the incident "as a storm in a teacup," according to the Algiers correspondent of the London Times (The Times, London, November 16, 1943 p. 5).

[36] Al-Misri, Cairo, November 12, 1943.

[37] See text of the letter in the Times, London, November 16, 1943.

[38] The Times, London, November 15, 1943, p. 4. See also Mr. Eden's subsequent declaration in the House of Commons on December 14, 1943, after his return from the Tehran Conference, in which he said: "Our interest in this matter [of the Lebanon] is twofold. We have sympathy, deep sympathy, with the national aspirations of the Arab World. We are the only country that has ever concluded a Treaty and withdrawn from an independent Arab State. Yet at the same time the preservation of order and tranquility in the Lebanon is an allied interest, for it closely affects the whole of our war effort in the Middle East": The Times, London, December 15, 1943, p. 8.

anon a normal constitutional situation as defined, within the framework of the Mandate, in previous statements made in the name of France." [39] On November 17 General de Gaulle, broadcasting from Algiers, declared that the problem was under consideration and that it was soon to be resolved. He reiterated the obligations of France as a Mandatory Power, but asserted that France would live up to the pledge of independence which had been given to the Lebanon. General Catroux was sent out to report on the crisis. He arrived on November 14, 1943, in Cairo, and stayed there to see Mr. R. G. Casey, British Minister of State in the Middle East, who had already been in Beirut for consultation with Sir Edward Spears.[40] In the meantime, M. Jean Helleu, the Delegate General, was recalled from Beirut. General Catroux arrived at Beirut on November 19, 1943, and broadcast a statement to the effect that, after discussing the matter with the French Committee, he would publish proposals for the solution of the Lebanese problem in order to reconcile French with Lebanese interests. He carried on negotiations with the Lebanese, British, and French authorities in the Lebanon. On November 21, 1943, it was announced that Shaikh Beshara al Khouri, President of the Republic, had been reinstated and that all the Ministers and Deputies had been released. The Prime Minister and his Cabinet were also reinstated and the situation returned to normal.

On November 28 President Beshara al Khouri made the following statement in which he indicated the position of the Government after the crisis: [41]

> We are independent, and as far as the Lebanese Government is concerned, there is no constitutional issue. We continue as if nothing had happened. Our Government functions. So does the Parliament. General Catroux tried to obtain a change of the Cabinet and a temporary prorogation of Parliament, admitting only my reinstatement as the President of the Republic, but had to give way because of the legal position.

Following the reëstablishment of the Government a wave of enthusiasm manifested not only the Lebanese people's deep desire for self-government, but also that of the whole Arab World for coöperation among themselves. Prime Minister Riadh al Sulh, speaking in the Chamber of Deputies on December 2, 1943, thanked the Governments of the United Nations, particularly Great Britain and the Arab countries, for their sympathy and warm support. Mr. George Hall, Under Secretary for Foreign Affairs, made a statement in the House of Commons on December 2, 1943, in which he thanked General Catroux for his statesmanship. "The present desire of His Majesty's Government," he said, "was to see an understanding reached between the Lebanese Government and the French authorities which would

[39] The Times, London, November 15, 1943, p. 4.

[40] It is reported that Mr. Casey consulted all available authorities in Beirut and, after returning to Cairo and meeting General Catroux, stressed the gravity of the situation and urged him not to go back on the declaration of independence.

[41] The Iraq Times, November 29, 1943.

enable constitutional development to proceed in an orderly and agreed manner as soon as possible." [42]

The situation in the Lebanon at present, from the point of view of the Lebanese Government, is the same as before the crisis, namely, that the Lebanon is independent, the Mandatory régime has come to an end, and the Organic Law stands as amended. From the international point of view, however, the situation can not be looked upon as defined with entire precision. The legal status of the Lebanon is not clear and needs reëxamination. General Catroux's promise to publish certain proposals has not as yet been fulfilled. It may take a long time to reach a final conclusion as to the precise definition of the legal status of the Lebanon; it may not be settled until eventually taken up by the Peace Conference itself.[43]

IV. *The Legal Controversy*

In analysing the Franco-Lebanese dispute from the Legal point of view, it may be said that three main points were involved. First, was the Mandate over the Lebanon terminated by the declaration of General Catroux? Secondly, was the declaration of independence by the Lebanon legally valid? Thirdly, was the Lebanese Government legally competent to amend its Constitution?

The first and second points are closely connected with one another. Normally, the declaration of independence should be preceded by the termination of the Mandate. The emancipation of Iraq from the Mandate is a case in point.[44] As a matter of fact, the A-Mandates were from the first considered as "provisionally" independent, according to the terms of the Covenant,[45] but their independence was held in "suspense" until the mandatory régime should come to an end.[46] We may argue, therefore, that the termination of the Mandate would immediately put the emancipated territory in a *de facto* status of independence. For such recognition of independence had already been given by the League, and consequently by

[42] The Times, London, December 3, 1943, p. 2.

[43] On November 29, 1941, Secretary of State Hull said that the United States welcomed steps toward the recognition of the "sovereign independence" of Syria and the Lebanon contemplated by the Mandate and the Franco-American treaty of 1924. The United States would, however, regard this treaty as continuing in effect until new instruments were concluded (Department of State Bulletin, November 29, 1941). On September 19, 1944, the United States accorded full recognition of independence to Syria and the Lebanon and appointed Mr. George Wadsworth minister to the two republics (New York Times, Sept. 20, 1944).

[44] L. H. Evans, "The Emancipation of Iraq from the Mandates System," American Political Science Review, Vol. XXVI (1932), pp. 1024–1049; also Majid Khadduri, Liberation of Iraq from the Mandate, Baghdad, 1936.

[45] "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized . . . until such time as they are able to stand alone" (Article 22 of the Covenant of the League of Nations).

[46] Quincy Wright, work cited, p. 331.

members signatory to its Covenant, and only held in suspense pending the termination of the Mandatory tutelage. *De jure* recognition would usually follow as a matter of policy.

In the case of the Lebanon the Free French had declared both the termination of the Mandate and the declaration of independence simultaneously, before the Council of the League of Nations had been called upon to decide upon the merits of the case through the usual legal procedure.[47] Could the French National Committee dispose of the mandatory obligations of France, as a Mandatory Power, and proceed to declare the termination of the Lebanese Mandate? Assuming that the National Committee possessed that right, can a Mandatory Power terminate a Mandate by unilateral action, without the legal channel provided by the League of Nations?

Let us examine these points separately. First, is the National Committee for French Liberation a legal body representing French interests and can it exercise, on behalf of France, sovereignty over French overseas territories and dependencies? Upon the collapse of France and the signature of the Armistice of June 22, 1940, the lawful Government of France was considered to be the Pétain Government at Vichy.[48] In the meantime, General Charles de Gaulle, with a group of Frenchmen, joined Great Britain to continue the struggle against Germany and her Allies. Great Britain recognized General de Gaulle on July 28, 1940, as the leader of the French people who had taken that action. Ever since that time General de Gaulle's movement had secured wider and wider recognition among members of the United Nations,[49] while the Pétain Government has suffered gradual extinction both in its international as well as in its constitutional status.[50] On October 23, 1941, a Free French National Council was formed as a Provisional Government with General de Gaulle elected as its President, and a National Advisory Council was appointed by him. On June 24, 1942, General de Gaulle issued a declaration calling for restoration of France and her Empire and declared that a post-war election of a national assembly would determine their future. On July 14, 1942, the Free French changed their name into Fighting France

[47] L. H. Evans, "The General Principles Governing the Termination of a Mandate," this JOURNAL OF INTERNATIONAL LAW, Vol. XXVI (1932), pp. 735–758; Quincy Wright, "The Proposed Termination of the Iraq Mandate," This JOURNAL, Vol. XXV (1931), pp. 436–446; Khadduri, work cited, pp. 28–31.

[48] Lt.-Col. Pierre Tissier argues that the Pétain Government, under the laws of the Republic "is an insurrectionary Government": Pierre Tissier, The Vichy Government, London, 1942. p. 54.

[49] Since 1940 the Free French movement has been granted either *de facto* or *de jure* recognition in various cases; *de jure* recognition was granted by Great Britain on July 28, 1940, and by the Soviet Union on October 26, 1941, while recognition *de facto* was granted by the United States on April 4 and June 9, 1942. Other United Nations have also granted recognition.

[50] Various Powers have broken off diplomatic relations with Vichy. Following Great Britain the United States broke off its relations on November 8, 1942; Canada on November 9, 1942; Mexico on November 9, 1942; Cuba on November 10, 1942, etc.

(*La France Combattante*).[51] On the other hand, the Pétain Government, on August 26, 1942, permanently dissolved the French Senate and Chamber of Deputies. Further, on November 11, 1942, Germany, in defiance of the terms of the Armistice of June 22, 1940, occupied Toulon, Marseilles, and other points on the Mediterranean coast, placing all the remainder of France under military occupation. Under such circumstances the French National Committee could properly act as a *de facto* body to represent French foreign interests during the war, pending the approval, as General de Gaulle declared, of a French National Assembly held after general elections in the post-war period. General de Gaulle has declared his intention to act according to the French Constitution of 1875, while the Pétain Government has in reality repudiated that constitution and put an end to its simulacra of independence.[52]

Assuming, however, that the French National Committee has a legal claim to represent French interests, does it follow that the Committee is competent to terminate a Mandate to France over a specified territory? According to the general principles governing the termination of a Mandate, it will be recalled, the Council of the League of Nations alone can decide upon the matter. It is true that the initiative must come from the Mandatory Power, but the final decision must rest with the Council of the League. The Mandatory Power has been selected only to render "administrative advice and assistance" [53] on behalf of the League of Nations, and therefore cannot, unilaterally, and without the approval of the League, declare the termination of that Mandate. Once the A-Mandate has been terminated the territory would, however, at once become independent. Recognition was given in the case of Iraq upon her entry into the League of Nations although admission to the League is not a necessary step in the termination of a Mandate.[54] Recognition after that admission was in fact a reiteration of an independence which had already been granted in the case of Iraq.

What happened in the case of the Lebanon was that independence was granted prior to the termination of the Mandate. Obviously such a declaration could only be construed to express an overt intention on behalf of the French authorities to put an end to the régime of Mandatory administration; but it certainly could not itself terminate the Mandatory system since that is ultimately to be decided upon by the Council of the League of Nations. Under the present circumstances the French National Committee could not

[51] On August 16, 1942, sixteen governments recognized the validity of Fighting French passports.

[52] Lt.-Col. Pierre Tissier argues that from the beginning the Pétain Government violated the Constitution of 1875, while General de Gaulle has promised to abide by it and as such, Pierre Tissier adds, General de Gaulle is "the sole legal authority in accordance with that Constitution": work cited, p. 54. [53] Art. 22 of the Covenant of the League of Nations.

[54] Majid Khadduri, work cited, p. 36.

bring the case of the Lebanon before the Council of the League of Nations. Lebanese independence, therefore, remains in "suspense," in spite of the proclamation of General Catroux, until the Mandatory régime is terminated by the Council of the League of Nations, which is the only legal authority to terminate a mandate. Yet the French declaration is of particular significance from the internal point of view; the Lebanese Government could in this way be granted full self-government, which may amount to a *de facto* independence, while the *de jure* independence can follow as a matter of course once the Mandate is terminated through the proper legal channels.

The contention of the French authorities, therefore, that the Lebanon is still under the Mandate could not be challenged from the legal point of view but their reluctance to transfer powers to the Lebanese Government is certainly inconsistent with their overt pledge to consider the Lebanese Government as independent, at least as a *de facto* independent state. It is held that the French authorities were ready to grant full self-government provided that the Lebanon would conclude a treaty with France. At the outset the French proposal seems to be quite reasonable; but it all depends on what sort of a treaty the French would like to conclude. Prime Minister Riadh al Sulh is reported to have said, in a stormy interview with M. Helleu, that he would rather cut off his right hand than sign such a treaty as was proposed by M. Helleu.[55] The negotiations with General Catroux might lead to a more successful conclusion with the Lebanese Government. On December 25, 1943, it was reported from Damascus that an agreement had been reached between General Catroux and representatives of the Syrian and Lebanese Governments for the transfer, as from January 1, 1944, of certain services hitherto carried out by the French authorities under their Mandatory powers.[56] Along such a line the Mandatory powers could be transferred gradually to the Lebanese Government, as a *de facto* independent government, pending the approval of the League of Nations at the earliest possible opportunity to declare its *de jure* independence.

Finally, is the Lebanon competent to amend its Organic Law? According to Article 1 of the draft Mandate for Syria and the Lebanon "the Mandatory Power shall frame, within a period of three years from the coming into force of this Mandate, an Organic Law for Syria and the Lebanon. This Organic Law shall be framed in agreement with the native authorities." The Organic Law for the Lebanon was required to be completed at a date not later than September 29, 1926, since the draft mandate came into force on September 29, 1923. The French Government carried out this article by sending Senator August Brunet to the Levant in June, 1925, to consult representative notables in the Lebanon. In July, 1925, a commission was set up under the chairmanship of M. Paul Boncour to prepare the draft Organic Law. In the same month a Representative Council, which had been elected, was convened in extraordinary session, to perform constituent

[55] The Times, London, November 16, 1943. [56] The Iraq Times, December 25, 1943.

functions. On December 10, 1925, the Council met and appointed a drafting committee. The debate in the Council began on May 19, 1926, and the Organic Law was accepted on May 22, 1926.[57]

The Organic Law was obviously prepared by the Mandatory Power in agreement with the Lebanese Government. It contained articles which reserved to the High Commissioner all the rights and duties of the Mandatory Power, as stipulated in Article 22 of the League Covenant and the draft mandate for Syria and the Lebanon, as well as the control of Lebanese foreign relations, the position of arbitrator between the Lebanon and other states under the French Mandate, the command of the police and gendarmerie when necessary for the maintenance of order, and the right of veto over the dismissal of the head of the state.[58]

Is the Lebanese Government competent to amend the Organic Law and modify, or eliminate, those rights and duties of the Mandatory Power specified in the draft Mandate for Syria and the Lebanon? It must be made clear at the outset that no alteration in the Organic Law could contravene the draft Mandate for Syria or the Lebanon, since the latter is an international instrument and any alteration in its provision must be approved by the Council of the League of Nations.[59] But is the consultation of the Mandatory Power necessary for the amendment of the Lebanese Organic Law? Article 76 of the Organic Law gives the power to amend the Organic Law to the President of the Republic and to the Chamber of Deputies. Such power was obviously exercised in former cases with the advice of the Mandatory Power, since the advice of the Mandatory Power was required under various other articles of the Organic Law.[60] Could such an amendment, under the new régime of the Lebanon, take place without consultation with the French authorities? The Lebanese Government, as a matter of fact, aimed at amending those very articles which dealt with consultation and advice of the Mandatory Power, before the régime under the existing consultation and advice had been entirely terminated. In other words, the Lebanese Government has itself followed the same procedure which the French National Committee followed, namely, it has put the cart before the horse. The action of the Lebanese Government, did not, however, contravene the draft mandate for Syria and the Lebanon; it only modified or eliminated those articles which dealt with the functions of the Mandatory Power. But such amendment does not at all mean that those powers have come to an end, since the power to modify the draft mandate still rests with the Council of the League of Nations.

Looking at the problem from this angle, the action of the French authorities in applying such drastic measures as they did seemed unnecessary. It

[57] See text of the Organic Law in *Taqwim al-Bashir*, Vol. 40 (1929), pp. 119–129.

[58] Arnold J. Toynbee, Survey of International Affairs, 1925, Vol. I, pp. 441–443; Survey of International Affairs, 1930, p. 309 n.

[59] Quincy Wright, work cited, pp. 119–126. [60] See Articles 90–95 of the Organic Law.

was certainly going beyond the law when the President of the Republic, the Prime Minister, the Cabinet, and 48 members of the Chamber of Deputies were suddenly arrested and removed from office by force. Even under the powers conferred by the Organic Law on the High Commissioner, such an action was not valid, since the High Commissioner could only veto fundamental laws and dismiss the head of the state. Thus M. Helleu, the Delegate General, could have protested against the action of the Lebanese Government or even vetoed the amendment, but certainly he could not suspend the whole machinery of the Government. Moreover, during the transitional period the Mandatory's obligations ought to have been gradually transferred to the Lebanese Government in order to create a really self-governing state, which lacked only the formal decision of the Council of the League of Nations in order to be in law as well as in fact fully sovereign.*

*See Department of State Bulletin, Vol. XI, No. 274 (September 24, 1944), p. 313, for recognition of Syrian and Lebanese independence by the United States.—ED.

THE LEGALITY OF THE ANNEXATION OF AUSTRIA BY GERMANY*

By HERBERT WRIGHT

Of the Board of Editors

The legality of the annexation of Austria by Germany under international law stems out from the peace treaties signed in the suburbs of Paris at the end of World War I.[1] The Treaty of Versailles of June 28, 1919, between Germany and the Allied and Associated Powers (including the Principal Allied and Associated Powers), provides (Art. 80)—

> Germany acknowledges and will respect strictly the independence of Austria, within the frontiers which may be fixed in a Treaty between that State and the Principal Allied and Associated Powers; she agrees that this independence shall be inalienable, except with the consent of the Council of the League of Nations.[2]

Such a boundary-fixing treaty was the Treaty of St. Germain of September 10, 1919, between Austria and the same Powers, which fixed (Art. 27) the frontiers of Austria with Germany as "The frontier of August 3, 1914."[3] This provision, therefore, is to be considered as incorporated in Article 80 of the Treaty of Versailles as a part of the obligation assumed by Germany.

Austria, on her side, assumed a similar obligation under the Treaty of St. Germain, which provides (Art. 88)—

> The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power.[4]

Austria, however, assumed an additional obligation to that of the "inalienability" of her independence without the consent of the Council of the League of Nations, namely, that of not compromising her independence "by any means whatever" and of not participating "in the affairs of another Power" (evidently meaning Germany) until her admission into the League of Nations.

Both Germany and Austria, therefore, are bound by the peace treaties,

* The following paper is derived from the author's memorandum on the "Attitude of the United States toward Austria," House Doc. No. 477, 78th Cong., 2d Sess.

[1] Since writing the paper presented here there has come to the author's attention Hans Klinghoffer, *Les aspects juridiques de l'occupation de l'Autriche*, Rio de Janeiro, 1943, which covers many of the points made here, but is not as detailed.

[2] Carnegie Endowment for International Peace, The Treaties of Peace, 1919–1923, New York, 1924, Vol. I, p. 59.

[3] Carnegie Endowment, work cited, p. 277.

[4] Carnegie Endowment, work cited, p. 297.

which provide that the independence of Austria is inalienable except with the consent of the Council of the League of Nations. Needless to say, the Council of the League of Nations has never expressed any approval of the alienation of the independence of Austria by way of its absorption by Germany. From the point of view of conventional international law, therefore, the annexation of Austria by Germany, lacking that consent, is null and void.

But the obligation assumed by Austria in the Treaty of St. Germain is corroborated and strengthened by the so-called Geneva Protocol. The collapse of Austrian currency in 1922 led Austria to appeal to the Council of the League of Nations, which succeeded in negotiating the basis for the signing, on October 4, 1922, at Geneva, of two protocols concerning the financial and economic reconstruction of Austria by the British, French, Italian, Czechoslovak, and Austrian Governments. In the first of these protocols, the four non-Austrian signatories solemnly declared—

> That they will respect the political independence, the territorial integrity, and the sovereignty of Austria;
>
> That they will not seek to obtain any special or exclusive economic or financial advantage calculated directly or indirectly to compromise that independence;

and the Austrian Government, on its part, undertook—

> in accordance with the terms of Article 88 of the Treaty of St. Germain, not to alienate its independence; it will abstain from any *negotiations* or from any economic or financial engagement calculated *directly or indirectly* to compromise this independence.[5]

Yet within a decade began the efforts of Germany to induce Austria to violate her solemn treaty obligations. The treaty-prohibited *negotiations* between German Reich Chancelor Heinrich Brüning and his Minister of Foreign Affairs, Dr. Julius Curtius, on the one hand, and Austrian Minister of Foreign Affairs, Dr. Johann Schober, on the other hand, led to the proposal of March 19, 1931 (published two days later), for the establishment of a Customs Union (*Anschluss*) of Austria with Germany.[6] This plan was abandoned on September 3 by its proponents, after the protests of France, Czechoslovakia, Poland, and other nations, on the eve of an Advisory Opinion by the Permanent Court of International Justice at The Hague that such a union would violate the Geneva Protocol of October 4, 1922, between Austria and the group of Powers guaranteeing a League of Nations

[5] French text and English translation in Manley O. Hudson (ed.), International Legislation, Vol. II, pp. 882–883. Italics mine.

[6] English translation of the Austro-German Protocol of March 19, 1931, in Manley O. Hudson (ed.), World Court Reports, Vol. II, pp. 746–748. An acount of the final achievement of the Anschluss with its historical background and relevant documents is contained in *Völkerbund*, VIIth year, no. 11–12 (March, 1938) and no. 13 (April, 1938).

loan to Austria.[7] The failure of the plan led to the resignation of the cabinet of which Schober was a member and the eventual formation by Engelbert Dollfuss of his first cabinet in May, 1932.

When Adolf Hitler became Chancellor of the German Reich on January 30, 1933, he immediately took steps toward the realization of his ambition to unite Austria with Germany, which he had expressed as the foremost goal of his foreign policy when he first embarked on his political career. The very opening lines of Chapter I of *Mein Kampf*, written in October, 1924 and published in 1925, disclosed this intention:

> Today I consider it my good fortune that Fate designated Braunau on the Inn as the place of my birth. For this small town is situated on the border between those two German States, the reunion of which seems, at least to us of the younger generation, a task to be furthered with every means and our lives long.
>
> German-Austria must return to the great German motherland, and not because of economic considerations of any sort. No, not even if from the economic point of view this union were unimportant, indeed if it were harmful, it ought nevertheless to be brought about. *Common blood belongs in a common Reich.* As long as the German nation is unable even to band together its own children in one common State, it has no moral right to think of colonization as one of its political aims.[8]

A few months after he became Chancellor, Hitler sent Dr. Hans Frank, Bavarian Minister of Justice, to Vienna to pave the way for the union. His visit was attended by a number of incidents and his deportation from Austria made Hitler realize that he could not achieve his goal by peaceful measures. Then began a series of incidents with increasing intensity which culminated in Germany's violation of her treaty obligations by the forcible seizure of Austria.[9] That Austria is absolved from any complicity in this treaty violation is evident from an account of the events which led up to it. Dollfuss himself, on the Party Day of the Christian Socialists in May, 1933, expressed himself not only opposed to the *Anschluss*, but even to Austrian National-Socialism.[10] Differences between Berlin and Vienna became accentuated with the acceleration of the German propaganda campaign by the dropping of leaflets from German airplanes over Austrian territory and

[7] Edwin M. Borchard, The Customs Union Advisory Opinion, this JOURNAL, Vol. 25 (1931), p. 711. Text of Advisory Opinion No. 20, Sept. 5, 1931, in Hudson, World Court Reports, Vol. II, pp. 711–743.

[8] Adolf Hitler, *Mein Kampf*, New York, 1939 (compl. and unabr. fully annot. Eng. trans.), p. 3. Italics original.

[9] A popular account of these incidents is given by Harold Nicolson, Why Britain Is at War, Harmondsworth, England, 1939, pp. 58–72.

[10] For many of the statements of fact mentioned herein, see the "Chronology" in the World Almanac for the respective year and *Keesings Archiv der Gegenwart* for July 14, 1936, p. 2641, which gives a survey of events from March 31, 1931, to the agreement of July 11, 1936, and *Keesings Archiv* for Feb. 15, 1938, p. 3424, which brings the account up to that date.

by German radio attacks on the Austrian Government. On June 19, 1933, the NSDAP in Austria was dissolved.

An exchange of speeches in the autumn of 1933 between Reich Minister of Foreign Affairs, Konstantin Baron von Neurath, on the one hand, and Austrian Vice Chancelor, Dr. Franz Winkler (who had founded a new party, the National Corporative Front), and Chancelor Dollfuss, on the other, resulted in an exchange of political prisoners, but subsequent Nazi acts of terrorism in Austria led the Austrian Government to complain to Berlin and to report the matter to the League of Nations and the great Powers. Hitler explained his position in the Reichstag on January 30, 1934, declaring:

> The assertion that Germany has the intention of forcing Austria is absurd and can not be proved. . . . The German Reich is—if the free will of the Austrian Germanity be completely respected—always ready to stretch the hand to a genuine entente.[11]

But the German reply to the Austrian complaints was not considered satisfactory by Austria. An abortive Social-Democrat putsch on February 12–16 was followed on February 17, 1934, by a declaration of guaranty of Austrian independence by France, Great Britain and Italy on the basis of a dossier on German interference presented by the Austrian Government. The Governments of these three nations issued an announcement to the effect that they took—

> a common view of the necessity of maintaining Austria's independence and integrity in accordance with the relevant treaties.

The Italian Government went further, by concluding with Austria (and Hungary) the Rome Protocol of Good Understanding and Collaboration of March 17, 1934,[12] which, in effect, established Italy as the protector of Austrian independence.

The revolt of the Social Democrats which had been suppressed induced the Austrian Government to devise a method for stricter control of affairs. On April 30, 1934, the Austrian Parliament approved the Federal Constitutional Law of that date,[13] vesting Federal legislative power, including constitution-legislation, in the Federal Government. The latter was also authorized to regulate the transition to the new order created by the Constitution of May 1, 1934,[14] providing for a "Christian German Federal State

[11] German text in *Keesings Archiv* for Jan. 30, 1934, p. 1254.

[12] Italian text and English translation in Hudson, International Legislation, Vol. VI, pp. 641–642. Two other Protocols were signed at Rome on March 17 and 23 by the same nations; texts in same, pp. 643–646.

[13] *Bundesverfassungsgesetz vom 30 April 1934 über ausserordentliche Massnahmen im Bereich der Verfassung*, in the *Bundesgesetzblatt für die Republik österreich*, Vol. I, no. 255/1934, issue 72.

[14] O. Ender, *Die neue österreichische Verfassung, mit dem Text des Konkordates*, Vienna and Leipzig, 1934 (3d ed.). See H. Arthur Steiner, The Austrian Constitution of 1934, this JOURNAL, Vol. 29 (1935), pp. 125–129.

on a corporative basis," which had been submitted to and approved in advance by the Parliament before it adjourned *sine die* on April 30.

Continued violent moves in Austria supposedly inspired by the German Ambassador in Vienna, Dr. Kurt Rieth, finally culminated in the attempted revolution of July, 1934. The Austrian Government on July 12, had issued an order whereby courts martial would impose the death sentence on terrorist bombers and even those caught in possession of bombs. On July 25 Chancelor Dollfuss was murdered in his room in the Chancery, Vienna, by Otto Planetta, one of a group of 144 Austrian Nazis who had forced their way in, apparently in expectation of capturing the entire cabinet. They were dislodged and captured a few hours later. The murderer and one of the leaders were court-martialed and hanged on July 30. Germany disavowed any connection with the abortive putsch, ostensibly suppressed Nazi activities in neighboring Bavaria and ordered home the German Ambassador in Vienna for indiscreet conduct, replacing him with former Chancelor Franz von Papen. The Austrian Vice Chancelor, Prince Ernst Rudiger von Starhemberg, carried on for a few days until July 29, when Dr. Kurt Schuschnigg, Minister of Justice, was made Federal Chancelor and formed a cabinet. Both were opposed to the ideology of the *Anchluss*.

Relations between Austria and Germany continued to attract the attention of the great Powers. The Governments of France, Great Britain, and Italy felt it necessary, on September 27, 1934, to renew their declaration of guaranty of Austrian independence.[15] Again, on January 7, 1935, France signed an agreement with Italy providing for consultation in case of a threat to Austrian independence,[16] to which Great Britain acceded on February 3.[17] The consultative agreement was confirmed by the Stresa Conference on April 13. It was perhaps the activities of these three nations in behalf of the maintenance of Austrian independence which induced Hitler, on May 21, to declare, in a lengthy address before the Reichstag, that—

> Germany has neither the intention nor the wish to interfere in the internal affairs of Austria, to annex it, or to realize the Anschluss.[18]

Chancelor Schuschnigg replied in an address before the Austrian Federal Diet on May 29[19] and a month later Vice Chancelor Prince Starhemberg in an interview with the Budapest *Az Est* formulated the conditions for the return of Austro-German relations to normalcy.[20] A Press Agreement between Germany and Austria was signed on August 27, 1935,[21] and the

[15] *Keesings Archiv* for Feb. 15, 1938, p. 3424; text in G. Fr. de Martens, *Nouveau recueil général de traités*, 3d ser., 39, p. 3.

[16] Text in The Times, London, Jan. 12, 1935, p. 11.

[17] *Keesings Archiv* for Feb. 15, 1938, p. 3424.

[18] Same for May 21, 1935, p. 2052. The German text of the entire speech is printed here.

[19] Same for May 30, 1935, pp. 2067 ff.

[20] Same for June 28, 1935, p. 2114.

[21] Same for Aug. 27, 1935, p. 2197.

two countries joined in the celebration on April 21, 1936, of the bicentenary of the death of Prince Eugen of Savoy.[22] Relations seemed to be improving. On July 11, 1936, an agreement was signed between Germany and Austria, whereby—

> (1) In the sense of the statement made by the Führer and Reich Chancelor on May 21, 1935, the German Government recognizes the full sovereignty of the Austrian Federal State.
>
> (2) Each of these two governments shall regard the internal political conditions of the other country, including the question of National Socialism in Austria, as a domestic concern of that country, on which it will not exercise any influence, either directly or indirectly.[23]

Austria, on the other hand, "acknowledged herself to be a German State," but added that this would not affect the position of Austria in regard to Italy as defined by the Rome Protocol of 1934 and its additional clauses of 1936.

This apparently amicable official relationship was ruptured on January 26, 1938, when Dr. Josef Tavs, Secretary of the "Committee of Seven," the established but legally unauthorized Nazi organization in Austria, was arrested by the Austrian Government. The papers found in his apartment showed that a widespread rising had been planned, including written instructions signed by "R. H." (Rudolf Hess, Hitler's Deputy) ordering Tavs to create disorders in Austria in the first weeks of April. Under the plan,[24] the moment a shot was fired by order of the Schuschnigg Government to restore order, German troops which would be concentrated on the Austrian border under the excuse of maneuvers, would enter Austria for the purpose of "preventing bloodshed." The arrest of Tavs and the seizure of this compromising document upset the German plan temporarily.

On February 12, 1938, Federal Chancelor Schuschnigg, in company with Dr. Guido Schmidt, State Secretary for Foreign Affairs, and von Papen, German Ambassador in Vienna, paid a visit, in the presence of Reich Minister of Foreign Affairs, Joachim von Ribbentrop, to Hitler at Berchtesgaden in Obersalzburg at the latter's invitation.[25] Von Papen had assured Schuschnigg that all that was needed to adjust the relations between Germany and Austria was a frank and friendly conversation.[26] Schuschnigg

[22] Same for April 21, 1936, p. 2522.

[23] *Völkerbund*, VIIth year, no. 11–12 (March, 1938), p. 150. Cf. New York Times, July 12, 1936, p. 1; The Times, London, July 13, 1936, p. 14.

[24] The main outlines of the plan are set forth in Eugene Lennhoff, The Last Five Hours of Austria, London, April, 1938, pp. 75–76.

[25] *Keesings Archiv* for Feb. 12, 1938, p. 3418; *Völkerbund*, VIIth year, no. 11–12 (March 1938), p. 150. The forcible seizure of Austria was foreshadowed two days earlier, Feb. 10, 1938, when Germany announced its intention to recognize "Manchukuo," which had been similarly forcibly seized by Japan. A treaty between Germany and "Manchukuo" was signed at Berlin on May 12, 1938. Christian Science Monitor, May 12, 1938, p. 1; Green H. Hackworth (ed.), Digest of International Law, Vol. I, p. 338.

[26] See Lennhoff, work cited, pp. 79–81.

brought with him the portfolio containing the case against Tavs, showing a violation of the Agreement of July 11, 1936, by Hitler's agents. This enraged Hitler, who declared that Schuschnigg himself had violated the July Agreement by his persecutions of the Austrian Nazis. He demanded the appointment of Dr. Artur Seyss-Inquart, President of the German-Austrian Volksbund and a prominent Nazi, to such position in the Austrian Government as would place him in charge of the whole Austrian police force.

A joint official communiqué published at Berlin and Vienna on February 15, 1938, after the Berchtesgaden interview stated:

> The object of this conversation was to clear up difficulties which had arisen in the execution of the Agreement of July 11, 1936. It was agreed that both parties were determined to keep to the principles of the Agreement and to regard it as a point of departure for a satisfactory development of relations between the two States.[27]

Early on the morning of the following day, in conformity with the conversation at Berchtesgaden, Seyss-Inquart entered the cabinet as the representative of the national opposition in the position of Minister of Interior and Minister of Public Safety, Dr. Schmidt (also a prominent Nazi) became Minister of Foreign Affairs and several other changes were made. Immediately after the formation of the new cabinet amnesty was officially proclaimed for Austrian Nazi prisoners (including Tavs).[28]

Two days later another official communiqué published simultaneously at Berlin and Vienna declared:

> By reason of the agreement concluded on 12 February 1938 at Berchtesgaden between the Austrian Federal Chancelor and the German Reich Chancelor, the Austrian National-Socialists shall henceforth have the possibility of legal activity within the ranks of the Patriotic Front and all other Austrian organizations. This activity can be exercised *only on the basis of the Constitution*, which excludes, after as before, the formation of political parties, and on a foot of equality with all other groups. *Measures will be taken by the Reich, in execution of the interdiction in force, to exclude all interference of the organizations of the [National-Socialist] Party in the internal affairs of Austria*, in order to contribute thereby to a satisfactory development.[29]

In the succeeding days the difficulties in the solution of the problem of dealing with the activities of the Austrian Nazis grew from bad to worse. The situation was aggravated by the strained relations of Great Britain with Italy over the latter's failure to give guaranties as to the withdrawal of Italian volunteers from participation in the civil war in Spain. Britain could hardly be expected to take any strong action in the Austrian matter

[27] *Völkerbund*, issue cited, p. 151; *Keesings Archiv* for Feb. 16, 1938, p. 3425.

[28] Same, p. 3426. This idea was developed by Schuschnigg in the course of a lengthy address on Feb. 24, 1938. *Keesings Archiv* for Feb. 24, 1938, pp. 3439–3444. For an account of Schuschnigg's visit to Berchtesgaden and its results, see Lennhoff, work cited, pp. 82–101, and *Keesings Archiv*, passim.

[29] *Keesings Archiv* for Feb. 18, 1938, p. 3428. Italics mine.

except in coöperation with Italy. It was the unsatisfactory relations with Italy which were partly responsible for the resignation of Foreign Secretary Anthony Eden on February 20.

On the evening of Wednesday, March 9, Schuschnigg announced in a speech to the Tyrol leaders of the Patriotic Front which was broadcast from Innsbruck that a plebiscite would be held on the following Sunday, March 13, for the Austrian people to vote on the following question:

> For a free and German, independent and social, for a Christian and united Austria! For peace and work and legal equality of all, who confess their adherence to the people and fatherland [of Austria].[30]

Those entitled to vote in the plebiscite were limited to Austrian Federal citizens, who were born at the latest in the year 1914 and therefore 24 years of age.

Two days later Dr. Hugo Jury, Deputy Leader of the *Volkspolitische Referat* (an organization representing the so-called "national" elements of the Patriotic Front), recommended that the National-Socialists abstain from participation in the plebiscite, chiefly on the ground that—

> by omitting two of the most important principles of the new Austria from the plebiscite question, namely, the authoritarian leadership and the corporative organization of Austria, the way was opened up to the democratic form of State and thereby to the Popular Front and the Bolshevization of our beloved fatherland.

He also maintained that Article 65 of the 1934 Constitution authorized a plebiscite only by the Federal President and not by the Federal Chancelor.[31]

The official position on this last point was that Article 65 was not applicable here, since it provided only for cases in which the people were called to vote on Federal legislation, but Article 93, which provides that—

> The Federal Chancelor determines the directives of policy. Within these directives each Federal Minister directs independently the branch of affairs entrusted to him.[32]

In an authoritarian state, the official position maintained, it was left absolutely to the discretion of the head of the Government to determine the moment and manner, according to his understanding of the general political

[30] English translation of proclamation of Schuschnigg in *Völkerbund*, issue cited, p. 152; cf. *Keesings Archiv* for March 9, 1938, p. 3466, which also gives the procedure and details for the holding of the plebiscite. For an account of how the news "broke" in Vienna, see also Lennhoff, work cited, pp. 120–133.

[31] *Völkerbund*, issue cited, pp. 153–154, which gives an English translation from *Wiener Neueste Nachrichten*, the morning edition of which was confiscated because of Dr. Jury's article. Cf. *Keesings Archiv* for March 11, 1938, p. 3468. Article 65, par. 1, provides that "The people shall be called to vote, when the Federal Government decides", etc., mentioning three instances of Federal legislation. Ender, work cited, p. 61. On the morning of March 11 an Austrian Nazi newspaper maintained that the proposed plebiscite was illegal and unconstitutional: Lennhoff, work cited, p. 30.

[32] Lennhoff, work cited, p. 71.

situation, for putting to the proof whether his political directives were in harmony with the will of the people.[33]

Another argument which the Nazis invoked against the plebiscite was the provision according to which the age limit of persons entitled to vote was fixed at 24 years. This objection is not precisely of a juridical nature. As the 1934 Constitution contains only a single provision, namely, Article 65, paragraph 2, fixing the age-limit for participation in a plebiscite, and that only on the matters enumerated in paragraph 1 of the same article, at 24 years, it goes without saying that by analogy the same age limit was fixed for a plebiscite juridically based on Article 93. Rather does the objection seem to have been based on political considerations, since the 24-year age limit would have debarred a great number of youthful National-Socialists.

After the actual annexation the additional reason was alleged that the plebiscite ordered by Chancelor Schuschnigg never had received the assent of the Ministers who represented the so-called national elements (more exactly, the National Socialists) and that consequently it constituted a violation of the Berchtesgaden agreement. This argument, invoked by both Ministers Seyss-Inquart and Dr. Edmund Glaise-Horstenau, is juridically unimportant and inaccurate, as is proven by the exchange of letters between Seyss-Inquart and Minister Guido Zernatto on March 9, 1938, on the one hand, and the reply and declarations of Chancelor Schuschnigg on March 10 and 11, on the other.[34]

Seyss-Inquart's letter to Zernatto mentions without any equivocation the conditions under which Seyss-Inquart and the Austrian Nazi elements represented by him would be prepared to give their assent to the holding of the plebiscite announced by the Federal Chancelor. It reads:

> . . . I am bound, in conformity with my duties, but also in consideration of the responsibility which I assume as Minister of Interior and of Public Safety, to request for the plebiscite for the observance of the following conditions:
>
> The plebiscitary procedure should take place in all the states according to an identical plan, the observance of which is incumbent upon the Minister of Interior. In each of the district commissions he would have one man of trust from the offices of the Volkspolitische Referat. The vote will be secret. For this purpose, there will be voting booths. The ballot will be cast in a closed envelope. The casting of an envelope containing a blank ballot or a ballot with remarks other than the addition of the affirmative or negative vote will be considered and counted as invalid votes.
>
> In the partial results as well as in the total result, the numbers of persons entitled to vote, persons who have participated in the vote as well as the number of affirmative, negative, and invalid votes should be set out. The different groups will have the liberty of giving instructions in meetings and by way of distribution of tracts. The voters shall

[33] *Keesings Archiv* for March 11, 1938, p. 3468.

[34] Printed in Guido Zernatto, *Die Wahrheit über Oesterreich*, New York and Toronto, 1939. Zernatto owns the original letters included in this correspondence.

not march in processions to the places in question, but individually. No manifestation shall take place on the day of the plebiscite. The protection of the plebiscite shall be entrusted exclusively to the executive forces.

On condition that the piebiscite is conducted as indicated above, I shall be in position to give it my consent following the obligation I assume in connection with Article 2, paragraph 3, of the Berchtesgaden agreement and I believe, moreover, I can guarantee, as Minister of Public Safety, the conduct of the plebiscite in peace.

Chancelor Schuschnigg, in replying to these passages of Seyss-Inquart's letter, declared:

. . . . . .

4. The same procedure for the plebiscite in the different states is guaranteed;

5. The execution of the plebiscite is entrusted to the governors of the state as heads of the delegated Federal administration;

6. The offices of the Volkspolitische Referat shall be represented by their men of trust in the plebiscitary commissions;

7. The vote shall be secret;

8. The technical procedure of the plebiscite shall be conducted in conformity with the proposals of the Minister of Public Safety. These proposals differ only in a few insignificant details from the provisions already ordered;

9. No group shall be granted the liberty of giving instructions, of holding meetings or conducting propaganda by way of distributing tracts. According to the Constitution, no political parties exist. The National-Socialists have been admitted on a footing of equality with the other groups of the Patriotic Front. As there is no group of the Front enjoying the liberty of giving particular instructions, no exception can be made for the National-Socialists;

10. No provision is made for the formation of parades by the participants in the plebiscite;

11. Provision has already been made for the interdiction of all manifestation on the day of the plebiscite;

12. The provisions already ordered provide that the protection of the plebiscitary procedure shall be assumed exclusively by the executive organs of the state;

13. The assent of the Minister of Public Safety to the organization of the plebiscite is not necessary. The Federal Chancelor nevertheless accepts with his thanks the declaration of this assent;

14. The Federal Chancelor is content to learn that the Minister of Public Safety is prepared to guarantee that the plebiscite shall be conducted in peace. . . .[35]

Thus, Dr. Seyss-Inquart and the Nazi elements represented by him had consented in formal fashion that a plebiscite under the form proposed by the Federal Chancelor should be organized and the assertion of the Minister of Interior that he had not been informed of the Chancelor's project was notoriously untrue. On the evening of March 10, an interview between the

[35] Zernatto, work cited, pp. 289 ff.

Federal Chancelor and Minister Seyss-Inquart took place, at which Seyss-Inquart once more declared that he was able to guarantee that the plebiscite would be conducted in peace. Moreover, he himself proposed to make a radio speech the next day to recommend to the "national" elements their participation in the plebiscite.[36]

In the early afternoon of Friday, March 11, an ultimatum to Schuschnigg from Berlin presented by Seyss-Inquart and Glaise-Horstenau demanded that the announced plebiscite be indefinitely postponed.[37] An hour later, Schuschnigg refused to accept it unless the Nazis would refrain from disturbing order. Hitler was dissatisfied with this and sent a second ultimatum, reiterating his demand for the indefinite postponement of the plebiscite and further demanding the resignation of Schuschnigg and the appointment of Seyss-Inquart as Chancelor in his place.[38] At 6:15, it was officially announced that the plebiscite was indefinitely postponed.[39] But the Nazis were still not satisfied with this compliance.

At 6:45 p.m., a third ultimatum, which had been flown from Berlin, was presented to Schuschnigg by Wilhelm Keppler, Hitler's representative in Vienna on special mission. The demands included the appointment of Seyss-Inquart as Chancelor of a majority National-Socialist Government and the establishment of the NSDAP as a legal party in Austria. The ultimatum referred to the presence of the Seventh Reichswehr Corps at the frontier [40] and gave Schuschnigg until 8 p.m. to make his decision, otherwise

[36] Zernatto, work cited, p. 295.

[37] Their attitude in presenting this ultimatum under the threat of withdrawing from the cabinet and declining all responsibility for anything that might subsequently happen, in direct contradiction to the assurances that had been given the preceding day, was determined by the orders that the two Ministers, according to their own testimony, had received from the Reich Government. Seyss-Inquart received his instructions by telephone from Göring and Hess and declared that decisions would henceforth be made in Berlin and his only mission would consist in "transmitting the orders without the slightest influence on the contents thereof." Zernatto, work cited, pp. 307 and 309. Thereby they violated not only their oath, taken in conformity with Article 84, par. 1, of the Constitution, but also Article 93. Their attitude might also be considered to constitute high treason under Section 58 (c) of the Austrian Penal Law, which provides that he commits the crime of high treason who acts in a way "to provoke or increase an external danger for the State or a revolt or a civil war within."

[38] Lennhoff, work cited, pp. 185–186.

[39] *Keesings Archiv* for March 11, 1938, p. 3468; Lennhoff, work cited, p. 196. In the evening of March 11 the German radio commenced to spread the "news" of alleged Communist troubles in Austria to justify the entry of German troops which apparently had been ready since Monday, March 7, that is, two days before Schuschnigg's announcement of the plebiscite.

[40] Von Ribbentrop had explained to Lord Halifax in London that the concentration of German troops along the Austrian border was merely as "a measure for the protection of the German frontier!" Lennhoff, work cited, p. 197. The *Deutsche Nachrichtenbüro* subsequently broadcast a communiqué in which the Reich Government formally denied the sending of an ultimatum to the Austrian Federal Government demanding the formation of a National-Socialist Cabinet, declaring this demand had proceeded from Austrian sources: *Völkerbund*, issue cited, p. 154.

the German troops would enter Austria that same evening, in order "to shed no blood in Austria."[41] At 7:50, shortly before the ultimatum expired, Schuschnigg spoke over the radio as follows:

> Today we have been faced with a difficult and critical situation. I am instructed to report to the people of Austria on the day's events. The Government of the German Reich has presented to the Federal President an ultimatum, with a fixed time-limit, demanding the appointment of a candidate of its own choice for the post of Chancelor and the formation of a Government in accordance with the proposals of the German Reich Government. In the event of a refusal, it is intended that German troops shall march into Austria at this hour.
>
> I place on record before the world that the reports spread in Austria to the effect that labor disturbances have broken out, that there has been serious bloodshed, that the Government is no longer in control of the situation and has not been able to maintain order, are inventions from beginning to end.
>
> The Federal President instructs me to inform the Austrian people that we are yielding to force.
>
> Determined at all costs even in this grave hour to avoid shedding German blood, we have issued orders to our armed forces in the event of an invasion to withdraw without serious resistance, without resistance, and to await the decision within the next few hours. The Federal President has placed General Schilhawsky, Inspector General of Troops, in command of the army. All further orders to the armed forces will be given by him.
>
> And so I take leave of the Austrian people at this hour with a German word of farewell and a heartfelt wish: "God protect Austria!"[42]

At 8:20, Seyss-Inquart, as Minister of Interior and Public Safety, in a radio address appealed to the Austrian people to preserve peace and order and reminded them especially "that there must be no question of resistance, even on the part of the executive, against the German army, which is very possibly approaching,"[43] and at the same time sent the following unprecedented request to Hitler to dispatch German troops:

> The provisional Austrian Government, which, after the resignation of the Schuschnigg Government, sees as its task the restoration of peace and order in Austria, addresses to the German Government the urgent request to support it in its task and to help it in preventing bloodshed. For this purpose it asks the German Government for the dispatch of German troops at the earliest possible time.[44]

[41] Lennhoff, work cited, p. 208.

[42] English translation in Lennhoff, work cited, pp. 213–214; and *Völkerbund*, issue cited, p. 154; repetition occurs in the original. German text in *Keesings Archiv* for March 11, 1938, p. 3468.

[43] *Völkerbund*, issue cited, p. 155; *Keesings Archiv* for March 12, 1938, p. 3469; Lennhoff, work cited, pp. 215–216. The German troops had already left Munich at 1 p.m.

[44] *Völkerbund*, issue cited, p. 155; *Keesings Archiv* for March 12, 1938, p. 3469; Lennhoff, work cited, p. 236. It would seem to have been unnecessary for a National-Socialist Government which, according to the subsequent plebiscite of April 10, had the support of 99.73 per cent of the population, to have required the assistance of foreign troops, including planes and tanks, to maintain peace and order against the remaining 0.27 per cent.

From the time of Schuschnigg's final radio broadcast, President Miklas must have been held incommunicado in "protective custody," since no statement of his whereabouts was available. At 1:30 a.m., on Saturday, March 12, from the balcony of the Federal Chancery, Dr. Jury announced the appointment of Seyss-Inquart, who had been requested by the Federal President "under pressure of the internal political situation," to take over the office of Federal Chancelor. At the same time eight others were named as members of the new National-Socialist Government.[45] Later on in the morning Miklas is said to have been conducted back to the Chancery under the "protective" guard of the Austrian Nazi Storm troopers.

Meanwhile, Hitler left Munich, whither he had flown from Berlin, and by auto crossed the Salzach River into Austria at Braunau am Inn, his birthplace, at 3:50 p.m., on March 12, paused there a while and then proceeded to the Danube and crossed the river to Linz, where he arrived at 8 p.m. and was greeted by Seyss-Inquart as "Mein Führer und Reichskanzler" in an address, in which he extended thanks to Hitler "from the hearts of millions of Austrians" and "at the same time solemnly declared that Article 88 of the [St. Germain] Peace Treaty is ineffective." This was the article guaranteeing Austrian independence. Hitler himself made a brief reply of thanks to the "German compatriots," referring feelingly to "the restoration of my homeland to the German Reich" and declaring:

> You see in the German soldiers, who from all sections of the Reich are on the march at this hour, ever-ready and ever-willing fighters for the unity of the entire great German people, for our liberty, for the might of our Reich, for its greatness and for its grandeur now and forever.[46]

On the morning of Sunday, March 13, 1938, the Seyss-Inquart Government "resolved" a Federal Constitutional Law, proclaiming (Art. 1) that "Austria is a state (*Land*) of the German Reich" and providing (Art. 2) for a plebiscite on April 10, 1938, on reunion with the German Reich.[47]

On this annexation of Austria by Germany, the late Professor James W. Garner succinctly and accurately commented:

> . . . it is of course true that Austria made no resistance to the German invasion but its Government protested and the German Reich's Chancellor refused to permit it to hold a plebiscite to determine the question whether the Austrian people desired to be annexed to Germany, after which a German army occupied the country and the Government of Austria was forcibly replaced by a Nazi regime set up by the German authorities. The Austrian Government so established, thereupon promulgated on March 13 a "constitutional law" proclaiming the

[45] *Völkerbund*, issue cited, p. 155; *Keesings Archiv* for March 12, 1938, p. 3469; cf. Lennhoff, work cited, pp. 232 and 236.

[46] English translation of both addresses in *Völkerbund*, issue cited, pp. 156–157; German text in *Keesings Archiv* for March 12, 1938, pp. 3470–3471.

[47] German text in *Keesings Archiv* for March 13, 1938, p. 3471; English translation in U. S. Dept. of State, Press Releases, Vol. 18, p. 374, and *Völkerbund*, issue cited, p. 1.

> union of Austria with Germany. It is submitted that to hold under these circumstances that annexation thus brought about was not the result of force directed from Germany would be to ignore the actual procedure for forms the hollowness of which is as clear as daylight.[48]

A logical conclusion from the above presentation would seem to be that the Austrians are entitled to the same rights and privileges as are extended to the Czechoslovaks, Poles, Danes, Dutch, Norwegians, and nationals of other overrun countries. To bring this down to practice, it might reasonably be argued, for instance, that just as German and Italian prisoners of war are segregated from each other, so Austrian prisoners of war should be segregated from German prisoners of war. This need not necessarily mean the freeing of the Austrian prisoners, but would be merely a matter of administration consistent with the policy of the United States toward the alleged "annexation" of Austria by Germany.

What might be regarded as somewhat of a precedent for such action, although possibly it was not applicable to prisoners of war, is presented by the treatment of the Poles who were natives or citizens of Austria in World War I. Although the Polish National Committee, which had been organized with headquarters in Paris under the presidency of Roman Dmowski, was not extended recognition "as an official Polish organization" by the United States Government until November 10, 1917,[49] the United States Government did not regard some Poles as alien enemies long before this. Austria-Hungary at that time was one of the belligerent Central Powers, but as early as June 29, 1917, Assistant Attorney General Charles Warren informed the Secretary of State that—

> Austrian citizens other than natives of Germany, and natives of Austria other than citizens or subjects of Germany are not being classed as alien enemies.[50]

Once the Austrian prisoners of war were segregated from the German prisoners of war, the way would be open for a sifting of the anti-Nazi Austrians impressed into German military service against their will from the pro-Nazi Austrians and the gradual release of the former from the restrictions retained for the latter. Here again, the precedent mentioned above offers a basis for such action. Although some Poles were considered to fall within the definition of the words "alien enemy" by the terms of Section 4067 of the *Revised Statutes*, Assistant Attorney General Warren stated that—

> It is needless to add, however, that in the matter of granting permits to all such as are within the terms of the statute due consideration is being paid to their sympathies and affiliations in this war.[51]

[48] James W. Garner, Questions of State Succession Raised by the German Annexation of Austria, this JOURNAL, Vol. 32 (1938), p. 422.

[49] U. S. Foreign Relations, 1917, Supp. 2, Vol. I, p. 778; Hackworth, work cited, Vol. I, p. 215. [50] U. S. Foreign Relations, 1918, Supp. 2, p. 206. [51] Same.

It is beyond the scope of this study to go into detail with regard to the beneficial effects of this and related acts toward the successful conduct of the present war, to its beneficial propaganda possibilities for the nations still subject to Germany's domination, to the possibility of drawing volunteers for the armed forces who are highly trained in German military science,[52] possibly an Austrian unit like those of the other "free" governments fighting for the liberation of their countries, or to the possibility of organizing from some outstanding emigré Austrian statesmen who can prove some legal connection with the last legal Austrian Government a Free Austrian Government-in-Exile. Striking corroboration of many of the points established has been furnished by the Declaration on Austria signed at Moscow by the foreign secretaries of the Governments of the United Kingdom, the Soviet Union and the United States of America, and published on November 1, 1943, in which it was declared that the three Governments—

> are agreed that Austria, the first free country to fall a victim to Hitlerite aggression, shall be liberated from German domination.
>
> They regard the annexation imposed on Austria by Germany on March 15, 1938, as null and void. They consider themselves as in no way bound by any changes effected in Austria since that date. They declare that they wish to see reëstablished a free and independent Austria and thereby to open the way for the Austrian people themselves as well as those neighboring states which will be faced with similar problems, to find that political and economic security which is the only basis for lasting peace.
>
> Austria is reminded, however, that she has a responsibility, which she cannot evade, for participation in the war at the side of Hitlerite Germany, and that in the final settlement account will inevitably be taken of her own contribution to her liberation.[53]

In the eyes of the Moscow signatories, Germany's annexation of Austria was "imposed" and therefore, "null and void," they are in no way bound by any changes effected since Hitler's invasion of Austria and they wish to see "a free and independent Austria" reëstablished. The concluding paragraph of the same Declaration supports the suggestion made at the end of the above presentation concerning the utilization of Austrian soldiers in the fight for the liberation of Austria. The contention made above was simply for the possibility of such utilization, whereas the Moscow Declaration speaks of an inescapable obligation—"a responsibility, which she [Austria] cannot evade."

[52] This would not violate Article 23 of the Regulations concerning the Laws and Customs of Land Welfare attached to Hague Convention IV of Oct. 18, 1907, that "A belligerent is also prohibited from compelling the nationals of the adversary to take part in military operations against their country, even in case they were in his service before the commencement of the war" any more than the utilization of Free French soldiers who escaped from forced German military service and for the same reason, that, since they would be volunteers, there would be no compulsion. This JOURNAL, Vol. 2 (1908), Supplement, p. 107; U. S. Foreign Relations, 1907, Pt. 2, p. 1211.

[53] U. S. Congress, 78th Cong., 1st sess., Congressional Record, Vol. 89, no. 164 (Nov. 1, 1943), p. 9026; U. S. Dept. of State, Publ. 2162 (War Documents), p. 14.

EDITORIAL COMMENT

PEACE AND SECURITY

World War I was a "War to end war." The four hundred and forty articles of the Treaty of Versailles did not, however, bring about this result.

The period between World War I and World War II demonstrated that a Treaty of Peace did not prevent danger of war when there were aggressive nations and leaders. Economy of national expenditures was not proven by the existence of formal peace; on the contrary, millions more were spent upon military preparations. Equality of states in other than formal legal aspects disappeared as national forces developed.

Even before the end of World War II the Governments of the United States of America, the United Kingdom of Great Britain, the Soviet Union, and China, acting in accordance with the Declaration of the United Nations of January 1, 1942, recognized the need of security for a rapid transition from war to peace. To that end they declared themselves in favor of united action "for the organization and maintenance of peace and security." They recognized the need of a "general international organization," open to "states large and small for the maintenance of international peace and security" and pending "the inauguration of a system of general security they will consult with one another."

Three of these Governments had, in a Declaration in regard to Austria, anticipated the problem of finding "that political and economic security which is the only basis of lasting peace."

Even the original Covenant of the League of Nations as formulated in 1919 was drawn up, according to the Preamble, "In order to promote international coöperation and to achieve international peace and security."

Sanctions were not, for various reasons, regarded as adequate in 1919, and many different solutions were proposed for the maintenance of peace, their authors not realizing that, as was said in the Austrian Declaration, "security is the only basis of lasting peace."

At the present time air force seems to be the key to international control; the French Government had, indeed, already on February 5, 1932, acted on this idea in offering, at the Disarmament Conference in Geneva, if other States agreed, to surrender all civil and military air force to internationalization.

Conversations among the leaders of the principal powers in recent months show the need of coöperation for safeguarding peace and security while at the same time demonstrating that the measures taken must be as simple as can be devised. This was emphasized by the Secretary of State in his speech on September 13, 1943, when he said: "to assure peace there must also be means for restraining aggressors and nations that seek to resort to force

for the accomplishment of purposes of their own. . . . Beyond final victory our fundamental national interests are—as they always have been—the assuring of our national security and the fostering of the economic and social well-being of our people."

G. G. W.

SHALL THE EXECUTIVE AGREEMENT REPLACE THE TREATY?

There has been considerable propaganda in recent years emanating from Washington and elsewhere designed to prove that the treaty-making power, requiring the Constitutional two-thirds Senate consent, is too cumbersome, slow, and "undemocratic" for the streamlined requirements of the present day, and that by a "usage" which supposedly has imperceptibly developed it is now possible and preferable to substitute for the Constitutional treaty the executive agreement, without Congressional approval if possible, with it (by mere majority) if necessary.[1] It is pointed out that some 1300 executive agreements have been concluded, as against about 900 treaties. It is not pointed out that, down to 1928, only 15 treaties had been rejected by the Senate, usually for some good reason, and 47 not acted upon, or that, while some 160 treaties have been amended by the Senate,[2] it would be hard to prove in most cases that this has not perfected and improved the treaty in the interests of the United States.

This effort to bring about a change in the Constitution, either with or without formal amendment, has its source in several grievances, with supposed moral support from the Supreme Court. The modern movement began with Secretary Hay's denunciation of the Senate for substituting the word "treaty" for the words "special agreement" in the projected arbitration treaties of 1904, which Theodore Roosevelt rightly thought, in view of the safeguarding reservations of "vital interests," "independence" and "national honor," were of no special importance. The movement received particular impetus, and finds its present source, in the belief that the two-thirds rule defeated approval of the Treaty of Versailles and thus "broke the heart of the world," to use Wilson's appealing phrase. As a matter of fact, the treaty deserved defeat because it was not a treaty of peace but a declaration of war, as several commentators have but recently observed.[3] In-

[1] Wallace McClure, International Executive Agreements, New York, 1941, reviewed by the writer in 42 Col. L. Rev. (1942) 887. Mr. McClure makes the concession—intended to be generous—that unimportant, non-controversial matters may still be left to treaty and Senate consent or approval, but that important and controversial matters become the subject of executive agreement (work cited, p. 378). An executive agreement comes into force on signature; there is no requirement for Congressional approval.

[2] Royden J. Dangerfield, In Defense of the Senate: A Study in Treaty-making, Norman (Oklahoma), 1933, p. 256.

[3] William C. Bullitt, "Consider Now the Tragedy of Versailles," Life, March 27, 1944, condensed in the Reader's Digest for June, 1944, p. 3. W. D. Herridge (former Canadian Minister to the United States), Which Kind of Revolution?, Boston, 1943, p. 23: "Versailles was not a treaty of peace but a declaration of war."

formed students at the time realized that it was likely to prove a charter for the production of more or less universal human misery. But actually only a few Senators, like the distinguished Robert M. La Follette of Wisconsin, perceived that fact at the time, and the treaty was defeated not on that ground. It was not even defeated, as it might have been, because Articles 10 and 16 purported to commit the United States to a "blank check" diplomacy, enabling foreign Powers to commit this country to war for the maintenance of the *status quo*. It was defeated because President Wilson requested the Democratic Senators not to accept the Lodge reservations, which made some effort to safeguard the interests of the United States, and were acceptable to the British and many students of the subject.[4]

More recently the Chairman of the Committee on Foreign Affairs of the House has published a pamphlet [5] urging that the House of Representatives be given a coördinate share in the "ratification" of treaties, by majority vote, because, although the proposal of James Wilson of Pennsylvania to that effect was defeated by ten votes to one in the Constitutional Convention of 1787,[6] the reasons for excluding the House [7] are now said to have disappeared and a more democratic method of treaty approval becomes necessary. The reasons alleged were the necessity for secrecy, speed, the short terms of House members, the fluctuating membership, the short sessions. While Chairman Bloom is probably correct in saying that these reasons were sound so long as the Senate was deemed an executive council, sharing in the negotiation of treaties, they are invalid now since the "advice" of the Senate is no longer sought. The Senate is faced with a *fait accompli* by the Executive, and is merely asked to give its subsequent "consent" by the Constitutional two-thirds. But while not all the reasons alleged are attributable to the assumption of Senatorial participation in negotiation, it is a well-known fact

[4] See Thomas Lamont in letter to the Editor of the New York Times, Sunday, April 23, 1944: "It was upon the Administration's insistence that the Democratic Senators voted against acceptance of the Covenant with reservations and thereby automatically voted to defeat the treaty." See Earl Grey's letter to the London Times, reprinted in New York Times, February 1, 1920, a letter endorsed by the British and French press. D. Fleming, The United States and the League of Nations, New York, 1932, pp. 411–413. See also Stephen Bonsal, Unfinished Business, New York, 1944, p. 278. The negligible part in the defeat of treaties played by the two-thirds rule is attested by R. Earl McClendon, "The Two-Thirds Rule in Senate Action Upon Treaties, 1789–1901," this JOURNAL, Vol. 26 (1932), pp. 37, 55.

[5] Treaty-Making Power: Fourteen Points showing why the treaty-making power should be shared by the House of Representatives, compiled and prepared by Sol Bloom, Chairman, Committee on Foreign Affairs, House of Representatives, 1944.

[6] Max Farrand, Records of the Federal Convention, New Haven, 1937 (Rev. Ed.) Vol. II, p. 538. Edward S. Corwin, The Constitution and World Organization, Princeton, 1944, p. 33.

[7] Summarized in W. Stull Holt, Treaties Defeated by The Senate, Baltimore, 1933, p. 7. George Washington denied the right of the House to be joined in the making of treaties; see his communications to the Senate in 1790 and 1792, cited by William Dewhurst, "Is the President the Sole Negotiator of Treaties?", Sen. Doc. 9, 67th Cong., 1st sess.

that many rules of law survive the disappearance of their originating reason. The rule in the Constitution in fact was also desired by many of the States, particularly small States, as a protection against treaties which a majority might conclude; indeed, it is well known that some delegates and ratifying conventions thought two-thirds too small, not too large, a protection. Besides, new reasons for such decisive Senate control have appeared, notably the unprecedented inflation of the executive power. If the House is merely to share in the "ratifying" power, as suggested, a much more fundamental revision of the treaty-making power, including wider consultation in the making of treaties, should be considered.[8]

The proposal to substitute the executive agreement for the treaty is open to many objections. Not only is it an evasion of the Constitution, characterized as dishonest and dangerous to the entire Constitution by eminent proponents of a change by the only lawful method,[9] a Constitutional amendment, but the executive agreement has weaknesses which militate against its wide use. Executive agreements, while absolutely necessary in the routine of administration, have dealt with matters not rising to the dignity of treaties and not covering matters of magnitude, executory character and continuing obligation, in treaty form.[10] While the Constitution does not define the

[8] See the proposals of ex-Ambassador Gibson in the address at Haverford College, June 3, 1944, reported in the New York Times, June 4, 1944, Pt. I, pp. 24–25, and Gibson's book, The Road to Foreign Policy (New York, 1944), pp. 174–187. See also the pre-war French method of legislative participation in treaty negotiation, recommended in Borchard, "Democracy and Foreign Policy," Bronson Cutting Lecture, February 7, 1938, p. 16, printed in the Congressional Record, Vol. 83, Pt. 9, pp. 538, 541. The "democracy" argument is hollow. In all constitutions some important actions require more than simple majorities; juries in capital cases must be unanimous.

[9] The Chairman of the House Committee on Foreign Affairs suggested that the two major Parties insert in their platforms a plank pledging that the peace treaties to be concluded after this war be validated by majority vote of both Houses. This, says the New York Times, is asking both parties "to pledge themselves to disregard the plain wording of the Constitution." In suggesting that "treaties" be called "agreements," the Times says: "This is merely to argue that we can get around the Constitution by conspiring with each other to call a spade by another name," and properly adds that if this can be done "we can do away with the need for any approval of treaties"; in fact, we can "interpret" the Constitution entirely away. The Times adds: "There is one honest, straightforward method of change," and that is by Constitutional amendment. New York Times, April 17, 1944, p. 22, (Editorial, "Approval of Treaties"). In an editorial published on May 22, 1944 (p. 22), the Times maintained: "This ignoring of a plain Constitutional requirement would be a dangerous precedent. It would put in doubt the validity of treaties and international agreements not ratified in the Constitutionally prescribed manner." See also Kenneth Colegrove, The American Senate and World Peace, New York, 1944, pp. 28, 31, 95, 105, and 110. See, however, the curious reasons for by-passing the Senate given by Q. Wright: this JOURNAL, Vol. 38 (1944), p. 341.

[10] See the report of the researches of Mr. A. C. Weinfeld in 3 Univ. of Chicago L. Rev. (1935) 453, who insists that the Founders were well acquainted with Vattel's distinctions between treaties and mere provisional or minor agreements. This difference is illustrated in Art. I, Sec. 10 of the Constitution: "No State shall enter into any treaty, alliance or con-

subject-matter of treaties and of the unmentioned executive agreements, the latter are made only under the authority of Congress, like postal and tariff agreements, or, if without prior authority, within the powers recognized as vested in the President, such as his military and diplomatic power, presumably with Senate acquiescence. Where the Senate objects, as in the case of the Santo Domingo Treaty of 1905 (ratified 1907), it has no difficulty in making its objections known. The "destroyer-naval bases" executive exchange of 1940 is hard to explain on legal grounds, in spite of the Attorney General's opinion.[11] It may be deemed to have received Congressional approval, incurring all incidental responsibilities, in the appropriations for the bases and in the Lease-Lend Act of March, 1941. Presidential powers to make compacts with foreign countries have usually been exercised within strict Constitutional and statutory limitations, as even Justice Sutherland admitted in the *Curtiss-Wright* case.[12] The UNRRA agreement was concluded with special acquiescence of the Senate.[13]

While armistices have been concluded by executive agreement, like those of 1898, 1918, and the undisclosed 1943 agreement with Italy, peace arrangements have traditionally been the subject of treaties. The country had great difficulty in extricating itself from the last war, and did not succeed until the passage of the Knox-Porter Resolution of July 2, 1921. It could have been done simply by repealing the 1917 Resolution declaring the existence of a state of war. But the actual peace terms, usually detailed and comprehensive, cannot in the nature of things escape treaty form and hence the Senate. In this connection it may be said that the Connally Resolution of November 5, 1943, which sought to safeguard the Senate's prerogatives by insisting on "Constitutional processes" in joining any peace organization and by providing that "any treaty" designed to produce international security shall be conditioned on Senate approval, is challenged as ineffective by Professor Corwin,[14] who maintains that the phrase "Constitutional proc-

federation; . . . no state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power." In addition, the word "treaties" is referred to in three separate Articles, concerning the making of treaties by the President, with the advice and consent of two-thirds of the Senators present (Art. II, Sec. 2, clause 2), the jurisdiction of the federal judiciary (Art. III, Sec. 2, clause 1) and the supremacy of treaties as the law of the land (Art. IV, clause 2), but the "executive agreement" is not mentioned.

[11] See criticism in this JOURNAL Vol. 34 (1940), by Professor Briggs, p. 569, and by Borchard, p. 690. See also Lord Lothian's criticism, Congressional Record, March 17, 1943, pp. 2180–2181, and Professor Corwin's letter to the New York Times, Oct. 13, 1940, Part IV, p. 6.

[12] United States v. Curtiss-Wright Export Corp., 1936, 299 U. S. 304.

[13] See the method called the Green-Sayre formula of August 24, 1943, described in Colegrove, pp. 28–30. See also Professor Briggs' account of the Panama Resolution of 1943 in 37 Am. Pol. Sci. Rev. (1943) 686. The petroleum agreement (New York Times, August 9, 1944) has been submitted to the Senate for approval as a treaty.

[14] Work cited, p. 52. "Constitutional procedure" in making any economic or military commitment in any agreement under the Lend-Lease settlements is provided for in the

esses" is "non-committal" and that "any treaty" means only that if a treaty is made of course the Senate must approve it. But there is no assurance that any commitments will take the form of a treaty.[14a]

The weaknesses and dangers of executive agreements advocated as substitutes for treaties, are, besides those mentioned, 1) that they permit of secret agreements, like the unpublished clause in the Lansing-Ishii Agreement of 1917, the Roosevelt-Katsura Agreement of 1905, and others; 2) that they bind only the Administration that made them, as Theodore Roosevelt stated, or else are of uncertain duration; 3) that they may be unilaterally terminated at any time, without obloquy; 4) that it is unsafe for the United States or a foreign country to rely on such agreements, since they can be disapproved by Congress at any time; 5) that they do not have the Constitutional force and dignity of a treaty;[14b] and 6) that, unless expressly authorized or acquiesced in, they are open to the charge of Constitutional "evasion."

Advocates of the proposed Constitutional revolution invoke with relish the opinions of the Supreme Court in the *Curtiss-Wright*,[15] *Belmont*[16] and *Pink*[17] cases. But lawyers in the United States must become accustomed to the idea that the members of the Supreme Court, like other human beings, are capable of injecting into their opinions, good and bad, a certain amount of unsupportable dictum—especially in matters outside their specialty. In the *Curtiss-Wright* case, where the question was whether Congress could delegate to the President the duty of imposing an impartial arms embargo on Bolivia and Paraguay in their Chaco War whenever he thought such embargo might contribute to peace between the two countries, Judge Byers in the District Court thought this could not be done, since it substituted mere presidential opinion for fact-finding—as earlier cases had held.[18] Justice Sutherland, on appeal, held for the Supreme Court that this was perfectly permissible. This was all that it was necessary to say. He did, however, add that in the matter of "negotiation" and "inquiry," the President's

Wadsworth Amendment to that Act. The Senate, with House approval, deleted the phrase "in any final settlement." Congressional Record, May 4, May 8, and May 12, 1944, pp. 4080, 4177, 4514. The Republican Party platform sought to remove any doubt by adding after "treaty" the words "or agreement" to the Connally Resolution. This change did not meet Prof. Corwin's approval. Letter to the New York Times, June 30, 1944.

[14a] Senator Pepper of Florida advocates that the peace and other agreements to be concluded with enemy and allied Powers be recorded in the form of executive agreements with majority vote of both Houses, rather than by treaty. Evidently he does not think they will be sufficiently persuasive to command a ⅔ vote. Associated Press dispatch from Washington Aug. 15, 1944.

[14b] Foreign countries are deemed to be acquainted only with the Constitution, not with current rationalizations of the executive agreement. See Charles Fairman in this JOURNAL, Vol. 30 (1936), p. 439.

[15] United States v. Curtiss-Wright Export Corp., 1936, 299 U. S. 304.

[16] United States v. Belmont, 1937, 301 U. S. 324.

[17] United States v. Pink, 1942, 315 U. S. 203. [18] 14 F. Supp. 230 (S.D. N.Y. 1936).

powers were inherent and plenary, beyond the control of Congress. Even this was *obiter dictum.* But he went on for twenty-two pages to present a disquisition on the "inherent" Federal and Presidential powers, which was utterly unnecessary to the case and contains enough ambiguities to afford indefinite sources of argument. He read into his opinion, in fact, his Columbia University lectures of 1918,[19] in which he undertook to show that the Federal Government—and presumably the President as its "organ"—derived sovereign and negotiating powers in foreign affairs from sources lying in national sovereignty and beyond the Constitution, though he was careful to point out that the Constitution limited the President in binding the nation. His ebullient remarks have given rise to much criticism, notably from the Dean of American historians, Charles A. Beard,[20] and other scholars. But the remarks are confined to a construction of the plenitude of Federal powers which was hardly justified by Constitutional or historical sources, and misled officials of the Department of State.

The dictum in *United States* v. *Belmont*, like *United States* v. *Pink*, involved the question whether, at the time of recognizing the Soviets in November, 1933, the President had, by the Litvinoff assignment of Russian-held assets in the United States—as a fund for the payment of American claims against Russia—also received as included therein the proceeds of Russian-owned private property in the United States (New York). An affirmative answer presupposed that Russia had successfully confiscated such property and that the United States courts must give effect to such extraterritorial confiscation. It involved the further question whether Soviet Russia had conveyed or could convey such property to the United States. Theretofore there had been a uniform rule, not only in the United States and American states, but also in all foreign countries, that such confiscations had no effect except as to property located in the confiscating state. Then in 1936 came the *Belmont* case, which arose solely on a motion to dismiss, without proof of New York law or policy, or creditors' or stockholders' rights. Instead of granting the motion to dismiss, as had two lower federal courts, Justice Sutherland denied it, and remanded the case for further proof of New York policy, of individual rights to the property, and whether the Fifth Amendment permitted public confiscation, whether by Russia or by executive act of the President. The minority, Justices Stone, Brandeis and Cardozo,

[19] George Sutherland, Constitutional Power and World Affairs, New York, 1919, pp. 120 and following.

[20] The Republic, New York, 1943, pp. 217–218. In a learned article by Professor C. Perry Patterson, 22 Tex. L. Rev. (April and June, 1944) 286, 445, entitled "In re the United States v. The Curtiss-Wright Corporation," Professor Patterson attacks Justice Sutherland's supposed discovery of the inherent powers of the Federal Government in internal or external affairs as "(1) contrary to American history; (2) violative of our political theory; (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous" (p. 297).

See also refutation of the inherent powers doctrine invoked in the Curtiss-Wright case in article by Judge Quarles: 32 Georgetown Law Journal (May, 1944) 375.

joined only in denying the motion to dismiss. At all events, when in 1941 the *Pink* case came along, involving title to a fund held by the New York Superintendent of Insurance after liquidation of the New York branch of a Russian insurance company, Justice Douglas, for the Court, over the vigorous protest of Justices Stone and Roberts, went the whole way in sustaining Justice Sutherland's dictum in the *Belmont* case. He held that Russia had confiscated the American property—which is denied by competent students of the subject—, that this private property was intended to be conveyed to the United States—which is also denied in the light of the historical facts—, that the executive agreement prevailed over New York law and policy, like a treaty, and that the Fifth Amendment did not prevent the United States from cutting off the rights of creditors and stockholders. This opinion, which has been misused to sustain the omnipotence of the executive agreement, has been criticized by practically all commentators on the subject.[21]

This is the authority on which rests the argument for a Constitutional change in the treaty-making power. While a Constitutional amendment is perfectly lawful, it seems to be a fact that the Gillette Resolution for an amendment—reducing Senate approval from two-thirds to a bare majority—like other Resolutions having a similar purpose, cannot command a majority in the Committee favorable to reporting it out. Those who support the propriety of the existing Constitutional arrangement have, for the most part, remained inarticulate; they will doubtless be heard from if the issue ever becomes acute. In the meantime, we may quote a competent scholar who, in reviewing Professor Colegrove's book, opposed any constitutional change in the following words:

> The Senate's treaty power is probably the last remaining bulwark of our national safety—even more, perhaps, than our armed forces—and it should be fought for and maintained at all costs.[22]

EDWIN BORCHARD

THE TWO-THIRDS VOTE OF THE SENATE IN TREATY-MAKING

The imminence of the end of World War II and the necessity for one or more treaties consolidating the assumed victory of the United Nations has served to focus attention on the historic rôle of the Senate of the United States in treaty-making. In the welter of the ensuing public discussion, a

[21] See, besides the comment in this JOURNAL, Vol. 36, p. 282, the following, all in 1942: 90 U. of Pa. L. Rev. 741; 51 Yale L. J. 848; 30 Georgetown L. J. 663; 58 Law Quar. Rev. 431; 5 Detroit L. J. 130. When the issue does not involve a Federal agreement, New York adheres to its view that a foreign confiscation of New York property is intolerable and will not be enforced. *Bollack* v. *Société Générale*, 1942, 263 App. Div. 601, 33 N.Y.S. (2d) 986. Must we conclude that when the United States Government becomes the beneficiary of the spoliation, the foreign confiscation is recognized; otherwise not?

[22] Professor Harry Elmer Barnes in The Progressive for March 20, 1944, Vol. 8, No. 12, p. 10.

number of proposals have been made for the abolition of the two-thirds vote of the Senate, some going so far as to suggest a Constitutional amendment substituting a majority vote of both houses of the Congress for the present two-thirds vote of the Senate.[1] Whatever may be the merits of such proposals, certainly the case for change has not been enhanced by some of the arguments which have been advanced by advocates of the abandonment of the traditional procedure.

First, it is charged that the two-thirds rule is undemocratic. This argument appears in the following words:

> In a democracy issues must be decided vote for vote. There can never be democratic rule where one vote of "no" counts for two of "yes." That is rule of the minority over the majority, and by no stretch of reasoning can the meaning of democracy be made to embrace such a rule.[2]

It is true that, in general, a majority vote is requisite for democratic rule, but this does not preclude the settlement of extraordinary matters of a fundamental nature by more than a majority vote. This was recognized by the framers of the Constitution in a number of other matters besides that of the two-thirds vote on treaties. There is also required (Article V) a two-thirds vote of both houses (not merely of the Senate) or the vote of the legislatures of two-thirds of the States for the proposal of a Constitutional amendment and the vote of the legislatures or conventions of three-fourths of the States for the ratification of Constitutional amendments. A two-thirds vote of the Senate is necessary for conviction after impeachment (Art. I, Sect. 3, cl. 6). A two-thirds vote is required for the expulsion of a member of either house of the Congress (Art. I, Sect. 5, cl. 2). It is true that ordinary legislation may be passed by a simple majority of the two houses, but, even in this case, if the President does not approve, a two-thirds vote of both houses is required to override his veto (Art. I, Sect. 7, cl. 2). All of these matters requiring more than a majority vote are of fundamental importance, and no one would seriously maintain, I suppose, that the United States has not enjoyed democratic rule during the past 155 years because of these provisions.

It is true, as Senator Pepper maintains, that the vote on treaties "should be as broadly representative of the popular will as the machinery of our government can make it." But this desideratum is more apt to be attained under the two-thirds vote of the Senate than under a simple majority of

[1] Such, for instance, as S. J. Res. 102, introduced by Senator Claude Pepper on Dec. 13, 1943, and H. J. Res. 264, introduced by Representative Sol Bloom on April 13, 1944, both of which provide for a majority concurrence of both houses of the Congress. S. J. Res. 36 and S. J. Res. 37, introduced by Senator Guy Gillette on Feb. 25, 1943, provided for a majority concurrence of the Senate alone.

[2] Senator Claude Pepper, "Peace Despite the Filibusters," New York Times Magazine, Dec. 12, 1943, p. 40. This argument was pointed out by James Wilson (Pa.) in the Federal Convention of 1787: Charles C. Tansill (ed.), Documents Illustrative of the Formation of the Union of the American States, Washington, 1927, p. 685. His argument did not prevail.

both houses of the Congress. It might be an easy matter for a party to muster an ordinary majority vote for a measure, although the majority of the people of the United States might be opposed to such measure. In the case of ordinary legislation, there is a remedy for such flaunting of the public will at the polls every two years, but no such remedy is available in the case of treaties with other nations. On the other hand, it would be extremely difficult to secure a two-thirds vote of the Senate on a treaty, unless that two-thirds vote represented at least a majority of the people. Senators, like all elected legislators, are very sensitive to public opinion and are apt to approve any treaty for which there is an evidently sufficient public demand.

Secondly, it is alleged that—

> It is now possible for seventeen Senators representing fewer than 11,000,000 constituents to thwart the will of 90 per cent of the people and 65 per cent of the Senators present and voting, on vital questions of foreign policy.[3]

Such an argument is fallacious. It is true that theoretically, in a quorum of 49, 17 could prevent the approval of a treaty. But the remaining 47 absent Senators would be either for or against the treaty. If they were for the treaty, would they remain absent, without making provision for their vote virtually to be counted by the system of "pairing," when they knew that their votes would be vital to its approval? If they remained absent under such a contingency, they would be constructively against the treaty. On the other hand, if they were actually against the treaty, then these 47 should be added to the 17 present who are against the treaty. So that, in the last analysis, there must be at least 33 Senators (whether present or absent), who are opposed to a treaty before such a treaty could be rejected.

Thirdly, it is alleged that—

> it is actually possible for thirty-three Senators representing one-twelfth of the people of the United States to block sixty-three Senators representing eleven-twelfths of the people.[4]

Theoretically, this is true, but it would be virtually impossible to be exemplified in fact. The 34 Senators representing the 17 least populous States, according to the 1940 census, represent a population of 10,518,249, embracing (in the order of least population) the States of Nevada, Wyoming, Delaware, Vermont, New Hampshire, Arizona, Idaho, New Mexico, Utah, Montana, North Dakota, South Dakota, Rhode Island, Maine, Oregon, Colorado and Nebraska. At the present time these Senators are divided into 16 Democrats and 18 Republicans. Seldom, if ever, would the Demo-

[3] A. Barr Comstock, Majority Vote Favored, letter to the Editor, New York Times, May 7, 1944, Sec. E, p. 8. Sometimes the argument takes the clever form of a passing reference to "the possibility of a veto by one third plus one of the Senate of the United States": Wendell Willkie, "Cowardice at Chicago," Collier's, Sept. 16, 1944, p. 77.

[4] Kenneth Colegrove, The American Senate and World Peace, New York, 1944, p. 13.

cratic Senators of Nevada, Arizona, New Mexico, Utah, Montana and Rhode Island vote solidly with the Republican Senators of Vermont, New Hampshire, North Dakota, South Dakota, Maine, Oregon and Nebraska against a particular treaty. Nor would the divided Democratic and Republican votes of the States of Wyoming, Delaware, Idaho, and Colorado be apt to be cast against the same treaty.

The fallacy of such an argument is shown clearly by turning it in the opposite direction. The 64 Senators representing the 32 least populous States represent a population of 42,959,945, less than one-third of the total population of the 48 States, as against a population of 88,046,239 of the 16 most populous States.[5] So that a purely artificial grouping such as proposed might under the same hypothesis mean that the Senators representing less than one-third of the population (but two-thirds of the States) would exert their will over the Senators representing more than two-thirds of the population (but only one-third of the States)! But again such an artificial grouping is practically impossible in fact. Seldom, if ever, would the (at present) 38 Democrats and 26 Republicans of the 32 least populous States unite to vote solidly against the 19 Democrats and 13 Republicans of the 16 most populous States on a particular treaty. Any argument of this nature is ultimately directed against the principle of the equality of the States, small as well as large, in the Senate.

The canard that the hatred of Senator Henry Cabot Lodge for President Woodrow Wilson was solely responsible for the failure of the Senate to approve the Treaty of Versailles has been refuted so authoritatively by the impartial account of the action of the Senate on this Treaty published twenty-four years ago by the present Editor-in-Chief of the Journal,[6] that it would not be mentioned here, were it not for the fact that it is persistently resurrected by advocates of the abolition of the two-thirds rule in support of their position. What are the facts? On November 19, 1919, the Lodge resolution of ratification with reservations was rejected by a vote of 39 to 55 and, upon reconsideration, by a vote of 41 to 51; the Underwood resolution of unconditional ratification was rejected by a vote of 38 to 53. On March 19, 1920, the Lodge resolution of ratification with reservations received 49 yeas to 35 nays. On this vote, of the 39 Senators who had favored unconditional ratification, 22 voted in the negative. Had only 7 of these 22 negative voters switched with their 17 affirmative colleagues to join with the 32 who favored ratification with reservations, the resolution of ratification with reservations

[5] Hugh Williamson (S. C.) called attention in the Federal Convention of 1787 to the fact that even a majority of the votes in the Senate might not constitute a majority of the population. Tansill, work cited, pp. 688–689. Elbridge Gerry (Mass.) spoke of the danger of entrusting the essential rights of the Union to "so small a number as a majority of the Senate, representing perhaps not one-fifth of the people": Tansill, work cited, p. 689. Their opinion did not prevail.

[6] George A. Finch, "The Treaty of Peace with Germany in the United States Senate," this JOURNAL, Vol. 14 (1920), pp. 155–206.

would have carried by the necessary two-thirds, while, if all 22 had switched, it would have carried by 71 to 13 (an 84-percent majority!).[7] But President Wilson, rejecting the advice of his friend, Col. Edward M. House, uncompromisingly refused "to leave to the Senate, this second time, full responsibility on the treaty." [8] Accordingly, Professor Bemis answers the question as to who was responsible for the rejection of the Treaty by saying: "The answer is easy, very obvious: both Lodge and Wilson. In effect these personal enemies united, for opposite motives, to kill the treaty." [9] Professor Bailey goes even farther and says: "Since these Democratic votes defeated the treaty with reservations, there is much truth in the assertion that Wilson himself kept the United States out of the League of Nations." [10] The truth of the matter is that no one man can muster any considerable group to support a campaign of mere personal hate in such a matter unless there is some other and more fundamental basis for his proposed action.

Fourthly, it is alleged that the two-thirds rule requires too long a time for Senate action on treaties and that, even if it was workable at the time of its inclusion in the Constitution, it is now obsolete. In the early days, it is maintained, treaties were bilateral, while now they are for the most part multilateral. As an instance of this changed character, Senator Pepper, who is among those who make this argument, states that the Senate—

> held the Treaty of Versailles over eight months, while twenty-six other nations waited for peace and our own Army of Occupation waited for orders to come home.[11]

Senator Pepper has selected a rather unfortunate example to support his point, since the records disclose that for seven months President Wilson had ignored all requests from the Congress for information and for the most part had spurned suggestions of advice or criticism, even from his friends. The delay in the Senate (and, incidentally, it was only 4 months and 9 days after the treaty was received by the Senate that it was rejected the first time) was due to the fact that the peace treaty had been combined with a plan for a league of nations. While it was desirable to have peace as quickly as possible, the entrance into a league of nations was too serious a question and fraught with too many far-reaching implications to be adopted quickly or without the most careful consideration. The desire of the Congress for a speedy peace is evidenced by the "round robin" resolution signed by 37 Senators on March 4, 1919,[12] by the Knox resolutions of June 10, 1919 (before the Treaty had been submitted to the Senate) and of November 18, 1919,

[7] Herbert Wright, Things to Be Avoided, letter to the Editor, New York Times, Jan. 23, 1944, Sec. E, p. 8.

[8] Samuel Flagg Bemis, A Diplomatic History of the United States, New York, 1942 (rev. ed.), p. 654. [9] Bemis, work cited, p. 655.

[10] Thomas A. Bailey, A Diplomatic History of the American People, New York, 1940, p. 675.

[11] Pepper, work cited. [12] Finch, work cited, pp. 156–157.

both of which failed of passage,[13] and by the joint resolution of May 15, 1920, declaring the war at an end, actually passed by both the House and the Senate but vetoed by President Wilson.[14]

Moreover, that delay is not of the essence of Senate action on treaties is evidenced by the record of the Senate on a sample dozen important multilateral treaties which have come before it within the past 35 years, as shown in the accompanying table.[15] The time required by the Senate to give its approval to ratification in the case of these twelve treaties ranges from 3 months and 9 days to only 2 days. The table shows that it is possible to secure speedy action on the part of the Senate, especially when, as is the case with several of those listed, the Senate's "advice" is secured during the progress of the negotiation by means of including ranking members of the Senate from both political parties among the negotiators.

Date	*Parties*	*Subject*	*Time in Senate* M	D
July 7, 1911	Great Britain, Japan, Russia, U. S. A.	Fur seals	0	2
July 5, 1912	Multilateral	Radiotelegraph	0	11
Dec. 13, 1921	British Empire, France, Japan, U. S. A.	Four-power pact for the Pacific	1	14
Feb. 6, 1922	British Empire, France, Italy, Japan, U. S. A.	Limitation of naval armament	1	19
Feb. 6, 1922	Belgium, British Empire, China, France, Italy, Japan, Netherlands Portugal, U. S. A.	Nine-power pact concerning China	1	20
Nov. 25, 1927	Multilateral	Radiotelegraph	3	9
Aug. 27, 1928	Multilateral	Renunciation of war (Briand-Kellogg Pact).	1	11
Jan. 5, 1929	20 American Republics	Inter-American conciliation	0	25
Apr. 22, 1930	France, Great Britain, Italy, Japan, U. S. A.	Limitation and reduction of naval armament	2	20
Oct. 10, 1933	Multilateral	Anti-war treaty of nonaggression and conciliation	1	22
Dec. 26, 1933	20 American Republics	Extradition	0	24
Dec. 23, 1936	21 American Republics	Maintenance of peace	1	3

This argument sometimes takes the form of calling attention to the number of treaties rejected by the Senate. For instance—

> From the beginning and through 1934 the record indicates that over 27 per cent of the treaties submitted to the Senate by Presidents of both parties, . . . have failed of ratification.[16]

[13] Herbert F. Wright, Philander Chase Knox, in Samuel F. Bemis (ed.), The American Secretaries of State and Their Diplomacy, Vol. IX, pp. 352–355.

[14] Text in this JOURNAL, Vol. 14 (1920), pp. 419–420.

[15] The material in this table has been compiled from U. S. Dept. of State, List of Treaties Submitted to the Senate, 1789–1934, Washington, 1925, and succeeding supplements.

[16] John B. Elliott, League May Be Revived, letter to the Editor, New York Times, Jan. 16, 1944, Sec. E, p. 8.

This does not tell the whole story with regard to Senate action on treaties. Of the nearly one thousand treaties submitted to the Senate up to 1934,[17] the Senate has approved 71 per cent without amendment and amended 18 per cent, making a total of 89 per cent accepted with or without amendment. Of the remaining 11 per cent, the Senate rejected outright a little over 1½ per cent (an incredibly small percentage),[18] took no final action on nearly 7½ per cent and a little over 2 per cent were withdrawn. It should be noted also that the fault in the case of inaction or withdrawals has not always been chargeable to the Senate. This record, it is submitted, is a creditable one for a concurring agency whose advice and consent have been sought for the most part only after the treaties were negotiated.

Finally, apparently oblivious of their argument in favor of a more democratic process than the two-thirds rule, the advocates of its abolition suggest by-passing it entirely if it be necessary to secure the particular treaties which they desire. They maintain that—

> There is considerable public sentiment in favor of by-passing the Senate by means of a so-called executive agreement.[19]

This is undoubtedly true among those individuals who impatiently wish the executive to impose on the people what these individuals sincerely think is for the people's own good, instead of allowing the people themselves through the democratic medium of their duly elected Senators to participate in deciding what is for their own good. The proper approach to this question would seem to be not to carp at the Senate because it sometimes shrinks from rubber-stamping what the executive negotiates, but to follow the Constitutional implication [20] by allowing the Senate to participate in giving "advice" in the negotiating stage through the inclusion of ranking members of the Senate Committee on Foreign Relations drawn from both parties among the negotiators. Such a procedure has made for prompt approval in the past.[21]

[17] The data presented here is based upon U. S. Dept. of State, work cited.

[18] "In less than a dozen of these cases can it be definitely stated that the two-thirds rule was responsible for the outright defeat of the treaty": Quincy Wright, "The United States and International Agreements," this JOURNAL, Vol. 38 (1944), p. 353.

[19] Elliott, work cited. Prof. Quincy Wright, work cited, p. 355, even goes so far as to say: "Not only is it legally permissible to by-pass the two-thirds rule, but it is politically practicable."

[20] Even Prof. Quincy Wright, work cited, p. 355, note 63, admits that it was "assumed" in the Federal Convention of 1787 that the President "would use the Senate as an executive council during the course of negotiations and so would be assured of its speedy consent." See Charles C. Fausill, "The Treaty-Making Power of the Senate," this JOURNAL, Vol. 18 (1924), p. 461.

[21] Compare the experience of Secretary William Jennings Bryan in securing the consent of the Senate to his "cooling-off" treaties, "every one of which was . . . advised to in advance" and some of which, by reason of the precaution which he had taken of consulting the Senate Committee on Foreign Relations, "were immediately consented to when they were submitted to the Senate in their negotiated form." James Brown Scott, American Society of International Law, Proceedings, 23rd Meeting, April 26, 1929, Washington,

For example, the Senate required only 1½ months to approve the Four-Power and Nine Power Pacts of 1922 and only 2½ months to approve the London Naval Treaty of 1930. In these instances, the Senatorial members of the negotiating commission were able to reflect the various wishes and varying tempers of their respective parties in the Senate and in this way it was possible to meet legitimate objections from them as far as practicable in the drawing up of the very terms of the treaties themselves.

The recent action of Secretary Cordell Hull in consulting with ranking members of the Senate on post-war problems is politically realistic and at the same time is in accord with the apparent intention of the framers of the Constitution when they provided for the "advice" of the Senate as well as its "consent" to the ratification of treaties negotiated by the President.

HERBERT WRIGHT

THE UNRRA AGREEMENT AND CONGRESS

The method by which the United States "joined" the international organization known as UNRRA (United Nations Relief and Rehabilitation Administration) seems worthy of comment on three points: (1) the legal character of the act by which the United States accepted membership, (2) the policy of encouraging the participation of Congressional leaders in the drafting of international agreements, and (3) the amendments and reservations qualifying participation by the United States in the UNRRA.

It will be recalled that objections to submitting treaties to the Senate for its advice and consent under the two-thirds rule have been based on charges that the Senate has rejected, delayed, or altered by disfiguring amendment a large number of treaties. Although the case against the Senate appears quite often to be grossly over-stated (at least, with regard to rejection and procrastination),[1] memories of the failure of the Senate to approve United States membership in the League of Nations have spurred a search for a practical alternative to the Constitutional provision that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." At the same time the greatly increased recourse to the executive agreement as a means of depriving the Senate of its constitutional prerogatives has been seriously criticized.

It has sometimes been stated that the United States "joined" the International Labor Organization by joint resolution of Congress. What actually happened was that in 1934 the Congress passed, and the President approved, a joint resolution by which the President was "authorized to accept membership" in that organization for the United States; the text of the joint resolution was communicated to the International Labor Office; the International

1929, p. 171. For instance, the Senate approved the treaties with Ecuador and Greece in 7 days, with Sweden in 9 days, with France, Great Britain and Spain in 10 days and with Russia in 12 days after signature.

[1] Royden J. Dangerfield, In Defense of the Senate, Norman, Okla., 1933.

Labor Conference invited the United States to accept membership in the International Labor Organization; and the President of the United States, exercising the authority conferred on him by the joint resolution approved June 19, 1934, accepted the invitation, thereby causing the United States to assume "such treaty obligations as are involved in membership in the International Labor Organization." [2]

In 1943 an attempt was ostensibly made to substitute the joint resolution for Senatorial approval in the accomplishment of an international transaction by which the United States would convey certain property rights and money to Panama. The normal procedure would have been to conclude with Panama a treaty by and with the advice and consent of the Senate, and then to ask Congress to pass the legislation necessary for the fulfilment of the obligations assumed in the treaty. Whether or not the employment of the joint resolution in this case was an attempt to secure fulfilment of an obligation previously assumed in the as yet unpublished executive agreement concluded between Panama and the United States by exchange of notes in Washington on May 18, 1942, is not clear.[3] It seems quite clear, however, that a Congressional joint resolution, unlike an international agreement, can neither confer rights nor impose obligations under international law on a foreign state.

Several weeks after the approval of the Panama Joint Resolution, the Department of State discussed informally with the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs the text of a draft agreement to set up a United Nations Relief and Rehabilitation Administration. The brief history of this UNRRA draft of June 10, 1943, is as follows: [4] In September, 1941, representatives of certain European governments-in-exile, meeting in London with the British Government to consider problems of relief and rehabilitation in liberated areas, formed the Inter-Allied Committee on Post-War Requirements. This Committee had neither operating powers nor an executive, but was serviced by a technical staff of British officials headed by Sir Frederick Leith-Ross. In 1942 both

[2] Manley O. Hudson, "The Membership of the United States in the International Labor Organization," this JOURNAL, Vol. 28 (1934), pp. 669–684. Since the joint resolution was adopted by a unanimous vote in the Senate Judge Hudson regards it as expressing the Senate's advice and consent in such a way as to meet the requirement of the two-thirds rule. Same, p. 675.

[3] Herbert W. Briggs, "Treaties, Executive Agreements, and the Panama Joint Resolution of 1943," American Political Science Review, Vol. 37 (1943), pp. 686-691; Lester H. Woolsey, "Executive Agreements Relating to Panama," this JOURNAL, Vol. 37 (1943), pp. 482–489.

[4] Hearings before the Committee on Foreign Affairs, House of Representatives, 78th Cong., 1st and 2nd Sess., Dec. 1943–Jan. 1944, on H. J. Res. 192, "To Enable the United States to Participate in the Work of the United Nations Relief and Rehabilitation Administration," pp. 8, 158, 163 (Cited as House Hearings); House Report No. 994 and Senate Report No. 688 (both 78th Cong., 2nd Sess.). For the text of the Draft Agreement for UNRRA submitted on June 10, 1943, see Department of State Bulletin, Vol. VIII, No. 207 (June 12, 1943), pp. 523–527.

the Soviet Government and the United States Government (which had observers with the Committee) suggested the creation of a truly international relief organization with an international staff. After more than a year of negotiations between the United States, Great Britain, the Union of Soviet Socialist Republics, and China, the United States, on June 10, 1943, submitted a draft agreement for a United Nations Relief and Rehabilitation Administration to the Governments of all the United Nations and other nations associated with them in the war. These Governments were informed that, although the draft proposal met with the approval of the four Governments initiating the plan, it was still tentative and subject to further discussion.

The UNRRA draft agreement of June 10, 1943, was informally communicated to the members of the Senate and House committees in July, 1943, as an executive agreement. (In the words of Senator Connally: ". . . it was proposed that it take the form of an executive agreement by the executive department with other nations, without any reference whatever to Congressional or Senatorial action.")[5] Since various Senators believed that the UNRRA draft agreement should be considered as a treaty and acted upon under the two-thirds rule, a sub-committee of the Senate Committee on Foreign Relations was appointed to discuss this question with the Department of State. What followed can best be described by quoting the Statement submitted by Mr. Francis B. Sayre of the Department of State to the House Committee on Foreign Affairs:[6]

> In the ensuing discussions which took place between the members of this subcommittee and Assistant Secretary Acheson and myself, representing the State Department, it was made clear that the draft agreement was not intended to impose binding obligations on the part of the United States but to set up the machinery for an international organization to administer relief and rehabilitation providing that contributions of funds should be made by each member government "within the limits of its available resources and subject to the requirements of its constitutional procedure."
>
> After considerable discussion, the subcommittee reached the conclusion that in view of certain modifications which Senator Vandenberg and others had suggested in the text of the agreement and which were incorporated in the final text, the best method of procedure would be along the following lines: That an effort be made to secure the agreement of the other 43 United Nations and associated governments to the changes proposed by Senator Vandenberg and by others in the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs and that if this could be done the President should sign the agreement and the Administration should be organized in accordance with the agreement. Following this a joint resolution should be introduced in Congress authorizing the President to expend such moneys as

[5] Congressional Record, Vol. 90 (78th Cong., 2nd Sess.), p. 1737 (daily edition, Feb. 16, 1944). He added that that conception was "combatted" by the Senate Foreign Relations Committee.

[6] House Hearings, pp. 158–159.

> Congress might from time to time appropriate for participation by the United States in the United Nations Relief and Rehabilitation Administration. Such a joint resolution presumably would be discussed and considered both in the House Committee on Foreign Affairs and in the Senate Committee on Foreign Relations and would also be debated on the floors of the House and Senate. This would give to Congress full opportunity to consider the extent to which the United States should participate in the work of the United Nations Relief and Rehabilitation Administration.
>
> Following the passage of the joint resolution, appropriation bills would then be introduced and would be considered first by the Appropriation Committees of the House and the Senate and then on the floor by the House and the Senate. In this way everyone concerned would have full opportunity to consider the whole program. I understand that the subcommittee of the Foreign Relations Committee concluded that if the changes which had been proposed were made in the text and the above program were followed, the introduction of a joint resolution would be an appropriate constitutional procedure. . . .
>
> In accordance with this program, the changes proposed in the text of the United Nations Relief and Rehabilitation Administration agreement were then put before the other 43 nations and their agreement was secured to them. We also set about drafting a joint resolution to be introduced in Congress in accordance with the program.

The international agreement establishing the United Nations Relief and Rehabilitation Administration was signed in Washington on November 9, 1943, and on November 10 representatives of the forty-four signatory governments and authorities met at Atlantic City to provide for the organization and operation of the Administration.[7] On November 15, 1943, House Joint Resolution 192, embodying the text of the international agreement as signed, was introduced in the House of Representatives.

In the light of this chronology, the alleged novelty of the method by which the United States joined the UNRRA appears to have been greatly exaggerated. The United States became a member of UNRRA by executive agreement. The international agreement was binding on the United States from the date of its signature by President Roosevelt,[8] without its submission to the Senate for advice and consent, and some days prior to the introduction of the joint resolution in Congress.

[7] First Session of the Council of the United Nations Relief and Rehabilitation Administration: Selected Documents. Department of State, Conference Series 53 (1944), p. 1. For the text of the UNRRA Agreement as signed see pp. 7–20.

[8] By Article IX of the Agreement for United Nations Relief and Rehabilitation Administration "this Agreement shall enter into force with respect to each signatory on the date when the Agreement is signed by that signatory, unless otherwise specified by such signatory." It is perhaps curious—in the light of our Constitutional provision as to the making of treaties—that, although the United States did not sign subject to Senatorial advice and consent, the Agreement was signed on behalf of fourteen Governments (Chile, Colombia, Cuba, Ecuador, Ethiopia, Guatemala, India, Iran, Iraq, Mexico, Nicaragua, Peru, Uruguay, Venezuela) with a reservation or statement to the effect, in each case, that the Agreement was signed subject to ratification or legislative approval. Same, pp. 15–20.

Nevertheless considerable confusion is reflected in certain statements on the matter. Mr. Sayre assured members of Congress that the international agreement was "not intended to impose binding obligations on the part of the United States." [9] Senator Connally assured the Senate that the whole spirit of the joint resolution containing the international agreement was "that the United States is not assuming any compulsory obligations whatever." [10] Senator Vandenberg informed the Senate that the conferences between the Senate subcommittee (of which he was a member) and the State Department had "produced what we both understand is to be not merely an executive agreement, but an agreement approved by Congress"; that "the theory upon which the agreement now comes to Congress is that it has ceased to be an executive agreement alone, which in our opinion would have been a gross violation of the proprieties as well as of the law. It has been submitted to Congress for congressional approval and not merely for congressional information." [11]

The implication that the United States would not be bound by the UNRRA Agreement until Congress had approved it by passing the joint resolution incorporating its text is negatived by the terms of the Agreement itself and by international law. Senator Taft saw the point when he observed that if the President "has power to make an executive agreement, then it is an agreement . . . which is binding on the United States." [12]

The statements by Mr. Sayre and Senator Connally reveal a misunderstanding of another sort: a failure to distinguish between the formal effectiveness of an international agreement and its content, or (to phrase it differently), between becoming a member of UNRRA and the extent to which members are obligated by the terms of the UNRRA Agreement to participate in the work of that organization. The confusion rests partially on the wide discretion left by the UNRRA Agreement to member Governments in the fundamentally important matter of the amount and character of their contributions to the work of the organization. Since this latitude was possibly increased by Senatorial amendments to the Agreement they require examination.

A comparison of the final text of the UNRRA Agreement with the text released on June 10, 1943, reveals some 27 or 28 variations between the two, of which but six or seven could, however, be called significant. How many of these were suggested by Congressional leaders, and how many by foreign Governments, we are not informed. Senator Vandenberg, however, told the Senate that as a result of the meetings of the Senate sub-committee with

[9] See Mr. Sayre's Statement, quoted above.

[10] Congressional Record, Vol. 90, p. 1745 (daily ed., Feb. 16, 1944).

[11] Same, p. 1746. Compare Senator Taft's comment: "Apparently the Senator suggests that it is a new kind of thing, an executive-congressional agreement, which may be entered into with foreign nations". He was quick to add that it "involves the implication that there are certain things which the President cannot do by executive agreement, but which he can do by executive agreement approved by Congress"; same. [12] Same, p. 1745.

State Department officials: "The entire agreement was rewritten in its fundamental character. It was stripped of every general obligation and responsibility. It was brought back to a simple authorization of appropriations for an international purpose, and it was written in a form which textually undertakes to limit our obligation without any question whatsoever to the specific appropriations that are to be made under the authorization from time to time by the Congress. I repeat, we entirely changed the character of the document, and obviously I think it ceased to be a treaty." [13]

In the context formulated by the statements of Sayre, Connally, and Vandenberg perhaps the most important change came in the phraseology of Article V of the Agreement. The June 10 draft stipulated that "each member government pledges its full support to the Administration, within the limits of its available resources and subject to the requirements of its constitutional procedure, through contributions of funds, materials, equipment, supplies, and services" to accomplish the purposes of UNRRA. The final text reads: "In so far as its appropriate constitutional bodies shall authorize, each member government will [*sic*] contribute to the support of the Administration in order to accomplish the purposes . . . [of UNRRA]. The amount and character of the contributions of each member government under this provision will be determined from time to time by its appropriate constitutional bodies."

Here, undoubtedly, is the key to the statements that the international agreement to which the United States was a party imposed no binding obligations on the United States: without contributions, which by the terms of the Agreement are largely discretionary, the Agreement is sterile. However, the passage of the joint resolution by Congress in itself neither appropriated money nor authorized United States membership in the UNRRA. The United States was already a member of UNRRA from the date of signature of the Agreement—without reservation, and with whatever international obligations that Agreement stipulates for member Governments.

There remains the question of the Congressional reservations. Not content with the incorporation in the Agreement of amendments suggested by Congressional leaders (and, of course, these amendments had to be accepted by the other 43 signatory Governments), Congress adopted a number of reservations conditioning United States participation in the UNRRA. The joint resolution [14] "authorized to be appropriated to the President such sums, not to exceed $1,350,000,000 in the aggregate, as the Congress may determine from time to time to be appropriate for participation by the United States" in the work of the UNRRA. In form the reservations were sections incorporated in the joint resolution, either conditioning the expenditure of funds to be appropriated from time to time by Congress under the

[13] Same, p. 1749.

[14] House Joint Resolution 192, 78th Cong., 2nd Sess. Approved by the President March 28, 1944. Public Law 267.

joint resolution or placing restrictive interpretations upon the language of the international UNRRA Agreement. In effect the reservations were probably intended[15] to be akin to Senate reservations to a treaty. It should be noted, however, that in the case of Senate reservations to a treaty the United States becomes a party to the international instrument subject to the Senate reservations incorporated in the resolution advising and consenting to ratification. In the case of the UNRRA Agreement, the United States was already a party to the international instrument, without reservation, several months prior to the passage of the joint resolution containing the Congressional reservations.

Some of the reservations require further comment. Article VIII (a) of the UNRRA Agreement stipulates that "Amendments involving new obligations for member governments shall require the approval of the Council by a two-thirds vote and shall take effect for each member government on acceptance by it." Various Senators feared that the President alone, without further consulting Congress, might commit the United States to new obligations. Senator Vandenberg thought the last word "it" in Article VIII (a) included Congress as well as the President ("the same legislative process by which the agreement is approved in the first instance"),[16] but the Senate adopted a reservation (Sec. 5) reading: "No amendment under Article VIII (a) of the agreement involving any new obligation for the United States shall be binding upon the United States without approval by joint resolution of Congress." The next reservation was of a similar nature. Referring to Article V of the UNRRA Agreement,[17] it read: "Sec. 6. In adopting this joint resolution the Congress does so with the following reservation: That in the case of the United States the appropriate constitutional body to determine the amount and character and time of the contributions of the United States is the Congress of the United States." Sec. 7, referring to a resolution adopted by the Council of the UNRRA reading that "the task of rehabilitation must not be considered as the beginning of reconstruction—it is coterminous with relief", stipulated that "in adopting this joint resolution the Congress does so with the following reservation: That it is understood that the provision . . . [quoted] contemplates that rehabilitation means and is confined only to such activities as are necessary to relief." By Sec. 8 Congress attempted to control the UNRRA in the following terms: "In adopting this joint resolution the Congress does so with the following reservation: That the United Nations

[15] Of the reservation contained in Sec. 7 of the joint resolution, Senator Connally said: ". . . we tie all this organization's activities down to relief only. We exclude rehabilitation." Of Sec. 8, he said: "We are tying the whole Administration, not simply our contribution, but we are tying the whole UNRRA to the proposition. . . ." 90 Cong. Rec., p. 2850 (daily ed., March 21, 1944). Senator Vandenberg told the Senate that he supported the joint resolution on the theory "that we have tied down Dean Acheson, who speaks for us in the UNRRA, and that we have tied down Director General Lehman." Same, p. 1740 (Feb. 16, 1944). [16] Same, p. 1746. [17] See above, p. 23.

Relief and Rehabilitation Administration shall not be authorized to enter into contracts or undertake or incur obligations beyond the limits of appropriations made under this authorization and by other countries and receipts from other sources." Although these reservations may in practice condition United States participation in the work of the UNRRA, in international law they are probably without legal effect in so far as the competence of the UNRRA is concerned.

One may conclude that the procedural novelty in this case lay not in joining the UNRRA by joint resolution (either alone or by "congressional-executive agreement"), but in the elaborate efforts made by the executive to cultivate Congressional approval, even to the extent of accepting amendments "stripping" the Agreement of international obligations and ostensibly changing its fundamental character, securing the consent of 43 other Governments to these amendments, and then accepting reservations which were partially a projection into the international sphere of legislative mistrust of an executive penchant for the expenditure of large sums of money and partially an attempt to control the policies of the international organization. The unusual and flattering experience of being permitted to participate in the "making" of an international agreement both by amendment and through reservations appears to have given Congress something of a field day. At the same time the close coöperation of the executive with Congress in this instance undoubtedly resulted in the prompt acceptance by Congress of the United States quota of $1,350,000,000 which was determined[18] in the first instance not by Congress but by an international organization to which the United States had become a party by executive agreement.

One feature of the procedure in this case—the stripping of an international agreement of its positive obligations on the parties—can scarcely be duplicated very often if the agreement is to have any meaning. For example, it is inconceivable that the articles of agreement on the International Monetary Fund, the International Bank for Reconstruction and Development, or the proposed General International Organization could be so amended as to provide that a party should have only such obligations as might be "determined from time to time by its appropriate constitutional bodies" without rendering the proposed organizations futile. In this respect the UNRRA Agreement may well be *sui generis*.

The problem remains largely unsolved. The full and generous participation of the United States in efforts to maintain international peace and security and to promote the common welfare is basic. It seems undesirable that the executive alone should commit the United States to strange new obligations, if only because full collaboration by the United States will often require Congressional action. At the same time it is equally undesirable

[18] Technically, of course, the Council of the UNRRA only "recommends" the amount of a national contribution: Council of UNRRA, 1st Session, Res. 14 (Financial Plan), Sec. 4; State Department Conference Series 53, p. 45.

that a carefully integrated draft of an international organization should be subjected to Congressional amendments based on prestige or a misunderstanding of the functional requirements of world order and well-being. Perhaps the most promising feature of the experiment with regard to United States participation in the UNRRA is the informal consultations carried on between the Department of State and the Senate sub-committee and House leaders. It is a hopeful augury that the method is being continued;[19] and it can be further developed. Experience and mutual education of this kind may in time lessen the threat of crippling amendments, as well as the antithetical dangers of the unfettered use of the executive agreement, or, alternatively, Senate rejection of treaties.

HERBERT W. BRIGGS

STATUS OF INTERNATIONAL ORGANIZATIONS: PRIVILEGES AND IMMUNITIES OF THEIR OFFICIALS

There is nothing new in the problem of providing appropriate immunities for officials of international organizations but the proliferation of such organizations today raises the problem afresh and brings about a realization that some uniform practice is desirable in this connection. Particularly under present conditions, where different bodies of subject matter are handled by experts drawn from various Government Departments, a lack of uniformity in this matter is very natural. Even where foreign office officials participate, the representatives may be from one of the technical divisions of the service and may not be familiar with diplomatic precedent on this particular topic. Some of these points will be found reflected in the history of the United Nations Monetary and Financial Conference held from July 1 to July 22, 1944, at Bretton Woods, New Hampshire. Before that they had come to light at the First Session of the Council of UNRRA at Atlantic City, in December, 1943.[1]

It is not to be assumed out of hand that identical provisions on the point in question are suitable for inclusion in every agreement establishing an international organization. It might be safer to begin with the opposite assumption. Nevertheless, there will probably always be some factors in common among the various organizations and it is at least desirable that the various precedents be kept in mind as we progress from conference to conference and from organization to organization.

The questions which were raised at Bretton Woods in the Monetary and Financial Conference had to do with the status of the proposed International Monetary Fund and its property and officials and likewise with the status of

[19] See the remarks of Senator Connally to the Senate at the time of the Dumbarton Oaks Conference: Congressional Record, Vol. 90, pp. 7255, 7256 (Aug. 22, 1944).

[1] See this JOURNAL, Vol. 38, pp. 105–106. The progress made by UNRRA in putting into effect the resolutions of its Council are summarized in: United Nations Relief and Rehabilitation Administration, Report of the Director General to the Second Session of the Council (Council II, Document 1), Washington, 1944, pp. 87–95.

the proposed International Bank for Reconstruction and Development, and its property and officials. In the study of these questions consideration was given to the recent experience of UNRRA and to preparatory discussions which have been taking place in connection with the work of the Interim Commission on Food and Agriculture. The Conference was organized in three commissions of which Commission I dealt with the Fund and Commission II with the Bank. It was inevitable that, to a certain extent, work should progress separately in the two commissions and it was not until the Conference had progressed considerably that the Fourth Committee of each of the two Commissions, which were charged respectively with such problems, began really to coördinate the proposals on this subject.

One of the principle problems to be solved was that of the nature and status of these two new organizations. This whole question of the status of international organizations is one which has long concerned international lawyers and has recently received interesting treatment by Mr. W. Friedmann in the *Modern Law Review*.[2] No serious difference of opinion was manifested at the Bretton Woods Conference relative to the desirability of giving to these organizations some kind of legal personality. The provisions finally adopted were as follows:

"The Fund [Bank] shall possess full juridical personality, and, in particular, the capacity [:]
"(i) to contract;
"(ii) to acquire and dispose of immovable and movable property;
"(iii) to institute legal proceedings." [3]

Similarly Article XV of the proposed Constitution of the Food and Agriculture Organization of the United Nations provides:

"The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution." [4]

Because of the difference in the nature of their operations, differing provisions were adopted for the Fund and the Bank relative to judicial process.[5]

Fund	*Bank*
"*Immunity from judicial process.*—The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy im-	"*Position of the Bank with regard to judicial process.*—Actions may be brought against the Bank only in a court of competent jurisdiction in the

[2] "International Public Corporations," in Modern Law Review, Vol. 6, p. 185.

[3] Article IX, Section 2, of the Articles of Agreement of the Fund, and Article VII, Section 2, of the Articles of Agreement of the Bank. United States Treasury, Articles of Agreement of the International Monetary Fund and International Bank for Reconstruction and Development, United Nations Monetary and Financial Conference, Bretton Woods, N. H., July 1–32, 1944, pp. 19 and 77.

[4] First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture, Washington, August 1, 1944, p. 46. [5] Articles cited, Section 3.

munity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract."

territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

Sections 4 and 5 of the respective articles of the Agreements on the Fund and the Bank dealing with immunity from other processes and immunity of the archives, are identical:[6]

> "Sec. 4. *Immunity from other action.*—Property and assets of the Fund [Bank], wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action."
>
> "Sec. 5. *Immunity of archives.*—The archives of the Fund [Bank] shall be inviolable."

Sections 6 and 7 providing for other freedoms and privileges are also identical, except for the words in Section 6 here printed in italics and parentheses which appear in the Bank Agreement but not in the Fund Agreement:

> "Sec. 6. *Freedom of assets from restrictions.*—To the extent necessary to carry out the operations provided for in this Agreement (*and subject to the provisions of this Agreement*), all property and assets of the Fund [Bank] shall be free from (*any*) restrictions, regulations, controls and moratoria of any nature."
>
> "Sec. 7. *Privilege for communications.*—The official communications of the Fund [Bank] shall be accorded by members (*each member*) the same treatment as (*that it accords to*) the official communications of other members."

These matters are handled in less detail in Article XV of the proposed Constitution of the Food and Agriculture Organization. Paragraph 2 of that Article reads as follows:

> "Each Member nation undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit, and exemptions from taxation."

[6] Except that the title of Section 4 of Article IX of the Fund Agreement is "*Immunity from other action*" while the title of the comparable section of Article VII of the Bank Agreement is "*Immunity of assets from seizure.*"

Of great importance is Section 8 dealing with the immunities and privileges of officers and employees. Again the sections are identical for the two Agreements. It will be noted that the text accepts the position that states are not obligated to extend all of the privileges to persons who are their own nationals. Nevertheless in respect to acts performed in their official capacities even nationals are granted exemption.[7]

> "Sec. 8. *Immunities and privileges of officers and employees.*—All governors, executive directors, alternates, officers and employees of the Fund [Bank]
>
> "(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund [Bank] waives this immunity;
>
> "(ii) not being local nationals, shall be granted (*accorded*) the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;
>
> "(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members."

In regard to immunities from taxation there is substantial identity, except for a particular provision in the Bank Agreement to suit one type of transaction of the Bank which is not applicable to the operations of the Fund. In the following text the special provisions in paragaph (c) (i) and in paragraph (d) of the Bank Agreement are printed in italics:[8]

> "Sec. 9. *Immunities from taxation.*—(a) The Fund [Bank], its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Fund [Bank] shall also be immune from liability for the collection or payment of any tax or duty.
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> "(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Fund [Bank] to executive directors, alternates, officers (*officials*) or employees of the Fund [Bank] who are not local citizens, local subjects, or other local nationals.
>
> "(c) No taxation of any kind shall be levied on any obligation or security issued by the Fund [Bank], including any dividend or interest thereon, by whomsoever held
>
> "(i) which discriminates against such obligation or security solely because of its origin (*because it is issued by the Bank*); or

[7] Compare Resolution No. 32 of the First Council Session of UNRRA, First Session of the Council of the United Nations Relief and Rehabilitation Administration, p. 62. See also C. Wilfred Jenks, "Some Problems of an International Civil Service," Public Administration Review, Vol. 3, p. 93.

[8] On the general subject of immunities of this type, compare Jenks, "Some Legal Aspects of the Financing of International Institutions," Transactions of The Grotius Society, Vol. 28, pp. 87, 120.

"(ii) if the sole jurisdictional basis for such taxation is the place or [9] currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Fund [Bank]."

"(d) *No taxation of any kind shall be levied on any obligation or security guaranteed by the Bank (including any dividend or interest thereon) by whomsoever held*

"(i) *which discriminates against such obligation or security solely because it is guaranteed by the Bank; or*

"(ii) *if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.*"

Instead of the hortatory provision in the UNRRA Resolution, the Fund and Bank Agreements impose an obligation to take any requisite domestic action for these purposes. Section 10 of the relevant article provides:

"Sec. 10. *Application of Article.*—Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Fund [Bank] of the detailed action which it has taken."

Article VIII of the proposed Constitution of the Food and Agriculture Organization covers the whole matter of the immunities of the staff and the duty of members with respect thereto, in one paragraph:

"Each Member nation undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Director-General and senior staff diplomatic privileges and immunities and to accord to other members of the staff all facilities and immunities accorded to non-diplomatic personnel attached to diplomatic missions, or alternatively to accord to such other members of the staff the immunities and facilities which may hereafter be accorded to equivalent members of the staffs of other public international organizations."

There is clearly need for a thorough study of this whole topic. Such a study would be of value not only for the science of international law, but for government departments and legislatures which will, of necessity, continue to grope for a satisfactory solution.

PHILIP C. JESSUP

UNITED NATIONS MONETARY CONFERENCE AND THE IMMUNITY OF INTERNATIONAL AGENCIES

Economists and financial experts, official and unofficial, have been evaluating the agreements elaborated at the United Nations Monetary and Financial Conference which met at Bretton Woods, New Hampshire, in July of this year. The ratification of the agreements by the United States will depend upon questions of financial and economic policy still to be debated in

[9] The printed pamphlet, cited in note 3, above, which is here quoted for the texts, has a misprint in Sec. 9 (c) (ii): the word "of" appears in place of the word "or" between "place" and "currency."

Congress. Some form of monetary stabilization will have to be undertaken if economic nationalism with its concomitant of barter and innumerable trade barriers is not to continue to threaten the peace of the post-war world. We do not propose to discuss here any of these economic and financial questions but we wish to give consideration to certain juridical problems in connection with the instrumentalities to be created under this plan for monetary stabilization. These instrumentalities must be fitted into the systems of jurisprudence of many countries if the scheme, or any one like it, is to work successfully in practice.

The purpose of the Conference was to promote among the United Nations, and later generally among all nations, international monetary coöperation, the balanced growth of international trade, the stabilization of exchange, the establishment of a multilateral system of payments between the member-states, the correction of maladjustments in their balance of payments without the resort to measures destructive of national or international prosperity and the promotion of a more rapid establishment of equilibrium in the international balance of payments of the member-states. The forty-four members of the United Nations represented at the Conference propose by two multilateral agreements to set up two instrumentalities (a) the International Monetary Fund and (b) the International Bank for Reconstruction and Development. The Fund is to be established by quotas of subscription on behalf of the member-states and to be so managed as to maintain a reasonably stable standard of international exchange without disrupting national economies. The Bank is to have a capital stock subscribed by each member-state in a minimum provided for. Its resources are to be used to extend long-term financial aid at reasonable rates to those countries whose industry and agriculture have been destroyed and also to promote sound industry and increase industrial and agricultural production in nations whose economic potentialities have not yet been developed.

The provisions to accord equable international participation in the management of both these institutions, the measure of the obligations which the various member-states assume, and the conditions upon which the benefits are accorded are all set forth in precise detail. These are matters of economic and financial administration, the adequacy and fairness of which have already given rise to an extensive literature both here and abroad. Certain legal features have not yet had adequate consideration.

The Fund is to possess "full juridical personality, and, in particular, the capacity: (1) to contract; (2) to acquire and dispose of immovable and movable property; (3) to institute legal proceedings." [1] The Fund, its property and assets, are to enjoy immunity from judicial process unless it waives its immunity for the purpose of any proceedings or by contract. Its property is to be free from restrictions, regulations, controls and moratoria of any nature, to the extent necessary to carry out its operations.[2] Officers

[1] Agreement relating to the International Monetary Fund, Art. IX, Sec. 2.

[2] Same, Art. IX, Sec. 3–6.

and employees of the Fund are to be immune from legal process with respect to acts performed by them in their official capacity and are accorded special privileges of immigration and travel.[3] The Fund is also to be immune from taxation and custom duties.[4]

The Bank, like the fund, is to possess full juridical personality.[5] Differing from the provisions with respect to the Fund, however, actions may be brought against the Bank "in territories of a member in which the bank has an office, has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities." [6] No such actions may be brought by members or by persons claiming through members. The Bank is to enjoy the freedom from local restrictions, regulations and controls similar to that enjoyed by the Fund. Officers and employees of the Bank are to enjoy similar privileges and immunities to those accorded to officers and employees of the Fund.[7] The Bank is likewise to be free of all taxation and custom duties.[8]

In view of Secretary Morgenthau's statement that the chief purpose of the Bank is to guarantee private loans through the usual investment channels, the provisions relating to the securities to be issued or guaranteed by the Bank have unusual significance. No taxation of any kind may be levied on any obligation or security issued by the Bank including any dividend or interest thereon which discriminates against such obligations or security solely because it is issued or guaranteed by the bank; or if the sole basis for such taxation is the place or currency in which it is issued or payable or the location of any office or place of business of the Bank. Each member is to take such action as is necessary for the purpose of making effective in terms of its own law these principles in its own territories and shall inform the bank of the detailed action which it has taken.[9] The property and the assets of the Bank are to be immune from search, confiscation, expropriation, or any form of seizure by executive or legislative action. Actions are permitted by private persons and corporations against the Bank but not by members or persons acting for or deriving claims from members. As the Bank can be sued, it must be presumed that a judgment may be rendered against it, although its assets are to be immune from attachment or execution up to the time of the delivery of final judgment against the Bank.[10]

It will be observed that while the Fund is given immunity from judicial process except upon its own waiver, there is no procedure by which claims can be adjudicated against the Fund. If a claim is asserted against the Fund by a member-state, it is quite conceivable that adjustment could be reached by negotiation with its board of governors, or through the diplomatic process with other member-states. Any dispute arising out of the interpretation of the terms of the agreement setting up the Fund is to be

[3] Agreement relating to the International Monetary Fund, Art. IX, Sec. 8. [4] Same, Sec. 9.
[5] Agreement relating to the International Bank, Art. VII, Sec. 2. [6] Same, Sec. 3.
[7] Same, Sec. 4–8. [8] Same, Sec. 9 a. [9] Same, Sec. 9 c–d. [10] Same, Sec. 3.

decided by the executive directors, or eventually by the board of governors. In the event of the withdrawal of a member or liquidation of the Fund, provision is made for an arbitration.[11] However, the Fund and the Bank will operate by buying and selling currency and exchange all over the world and will, therefore, have to deal not alone with governments but also with private individuals, banks and other corporations. It must be assumed that the officials of the Fund and of the Bank will treat fairly all those who have business with them. High business standards are as necessary for the success of such an institution as its own financial solvency. On the other hand, experience teaches that when immunity from process is granted to a state or governmental agency, either by customary, international, or municipal public law, officials, even when acting in perfect good faith, are more apt to make interpretations *ex parte* and to delay settlement, than if they were answerable to an impartial tribunal.

Secretary Morgenthau, as chairman of the Conference, has pointed out that "this monetary agreement is but one step, of course, in the broad program of international action necessary for the shaping of a free future."[12] It is already manifest that the treatment of economic and social problems by international action will be delegated to autonomous agencies. This approach has already given rise to the UNRRA; also to a plan for a permanent United Nations Food and Agricultural Organization, to plans for a "permanent international petroleum council" as envisaged by the Anglo-American Agreement on Petroleum of August 8, 1944, and to other autonomous agencies covering civil aviation, shipping, commodity agreements and other subjects. As a Canadian commentator has remarked: "The monetary plan should be regarded as only one part of an integrated program."[13] These autonomous agencies are to function not only in behalf of the numerous problems presented in liquidation of the war but also for the establishment of better conditions for a post-war world. The danger is that such agencies will seek to operate under international mandates with powers comparable to those set up by national governments to meet the emergent demands of a state at war.

The monetary agreements show plainly that the corporate form is to be used to carry out world-wide activities and that intimate relations with private persons and institutions all over the world are contemplated. What jurisdiction shall be competent and what system of law shall be applied in deciding inevitable disputes? The terms of the monetary agreements would seem in part to eliminate and in part to restrict sharply recourse to national courts. Even the access to national courts in respect to transactions with the Bank, restricted as it is by the agreements, will be further

[11] Agreement relating to the Fund, Art. XVIII. Similarly, arbitration is provided for disputes between the Bank and its members: Agreement relating to the Bank, Art. IXc.

[12] New York Times, July 23, 1944, p. 25.

[13] L. Rasminsky in Foreign Affairs, July, 1944, p. 603.

limited in numerous cases where the primary obligation such as a guaranteed loan is that of a state. All proceedings would be halted by the immunity which states enjoy in national courts by reason of the rules of international law. Attempts to modify the injustices of the rule where the state has engaged in private business have not met with much success. Recourse to some system of international tribunals should be provided, not limited to a single central court such as the Permanent Court of International Justice.

One of the stated purposes of the Bank is to enlarge the volume of international investment. If the international community is to intervene for the accomplishment of this purpose in the post-war world, a single court will be so patently inadequate as to discourage free transactions with the Bank. It is pertinent to recall the procedure which certain French banks were obliged to follow in 1928, in their dispute with the governments of Brazil and the Serb-Croat-Slovene State, respectively. The cases involved the interpretation of clauses contained in obligations of these Governments which were floated in France and held by the French banks, relating to the monetary medium in which the bonds were payable.[14] The dispute was precisely of the kind likely to arise in flotations issued or guaranteed under the plan now under consideration. Although primarily a question of private interest, the French Government brought the cases before the Permanent Court of International Justice by intervening as a party on behalf of its nationals, a procedure too cumbrous and expensive for both claimants and obligors to recommend itself for future adoption.

A proposal has recently been presented to the Section of International and Comparative Law of the American Bar Association for a post-war international judicial organization under which the Court would continue as "the highest tribunal of an accessible system of interrelated permanent international courts with obligatory jurisdiction," together with international circuit courts to be established at the capital of each member nation.[15] Dr. Jan Hostie of Belgium, in an admirable article published in this JOURNAL, has recently pointed out the difficulties of giving the Court "functions which it could not discharge without danger to the performance of its original and proper functions."[16] On the other hand, Dr. Hostie's comprehensive discussion shows that the Court as an institution may be considered to be in a state of flux. Our own conclusion is that its present jurisdiction must be greatly enlarged or other institutions must be created to deal with international claims of great importance for which no other forum is provided.

In the matter of international judicial reform it is important to distinguish between measures related to permanent post-war organization and those

[14] Permanent Court of International Justice, Judgments Nos. 14 and 15 (1929); Publications of the Court, Series A, Nos. 20/21, pp. 6, 93.

[15] Advance Program of the 67th Annual Meeting held in Chicago, September 1944, p. 117.

[16] Vol. 38 (1944), p. 421.

which are necessary for the immediate settlement of the war. The UNRRA is an international agency of the latter type and it is therefore interesting to observe that its Council has recommended that it be accorded immunities and exemptions to personnel and assets similar to those we have already described.[17] The Fund and the Bank are agencies which will function in settlement of both war and post-war problems.

It would be too much to expect the immediate establishment of an international system of regional or local courts although such a system seems to be envisaged in the plan reported to have been presented to the Dumbarton Oaks Security Conference by the State Department.[18] In the meantime reliance is being placed by the United Nations upon autonomous agencies to function immediately. It is therefore important that the immunities granted to such agencies be accompanied by recourse to some system of local arbitral tribunals in which protection may be accorded to private as well as public interests. It has been pointed out that a right of appeal to the Permanent Court of International Justice can be accorded by appropriate treaty provisions without disturbing the Statute of the Court.[19] The protection of private rights is an immediate, not a remote requirement, to assure the smooth functioning of such agencies and as a counterbalance to the alarming growth of state power due to the war.

ARTHUR K. KUHN

THE LEGAL STATUS OF THE BUKOVINA AND BESSARABIA

Two important events—the triumph of Russian arms in evicting the Axis and its satellites from the pre-1939 limits of the USSR and the withdrawal of Romania from the Axis camp on August 23, 1944—focus world-wide attention on the area which, between World War I and World War II made up the Kingdom of Romania. After the ebb and flow of battle, just where does legality stand, and what is the status of these areas? While other areas, such as Transylvania and the Dobrudja, enter into the tangled diplomacy of the resection of Romania, the Bukovina and Bessarabia are the principal touchstones to the situation. They constitute, in 1944, one of the most critical territorial problems bequeathed to the present generation as a direct legacy of the age-old Eastern Question.

Both areas entered the arena of European dynastic diplomacy in that eighth, geopolitically conscious decade of the eighteenth century which witnessed the First Partition of Poland and the consolidation of Imperial Russia's hold on the Black Sea littoral. As a reward for his mediation between Russia and the Porte in effecting the Peace of Kutchuk Kainardji, Emperor Joseph II, without consulting the Prince of Moldavia, prevailed on

[17] Resolutions and Reports of the Session of the Council of UNRRA, December 1, 1943, this JOURNAL, Vol. 38 (1944), Supplement, p. 176.

[18] New York Times, August 23, 1944, p. 10.

[19] Dr. Hostie's article, as cited, at p. 418, quoting from Art. 36 of the Statute.

the Ottoman Government to cede to Austria, by the Convention of Palamutca, of May 7, 1775, and the Act of Demarcation which followed five days later, confirmed by the Frontier Treaty of February 25, 1777,[1] the beech-covered areas of Northern Moldavia which were thenceforth known, juridically and administratively, as the Bukovina.

Originally inhabited by a largely Moldavian (i.e., Romanian) population, the Bukovina, in almost a century and a half of Austrian rule, underwent radical modification of its ethnic structure and was heavily colonized by German and Ruthene (i.e., Ukrainian) stocks. When, in 1916, Romania was induced by the British, French, Italian and Russian Governments to enter World War I, they promised her, by the secret Treaty of Bucharest and its annexed Military Convention of August 4/17 of that year [2] not only the annexation of Transylvania at the expense of the Kingdom of Hungary, but also that of the Bukovina at the expense of the moribund Austrian half of the Dual Monarchy. The ultimate occupation of the Bukovina by Romania at the close of the war was followed by its formal cession by Article 59 of the Treaty of Saint Germain [3] and, as in 1777, by the confirmation of the new boundaries by Article 3 of the "Certain Frontiers" Treaty of Sevres on August 10, 1920.[4] On this juridical foundation title to these parts of the Romanian realm rested down to 1940.[5]

Bessarabia, by contrast, was, between 1774 and 1812 an object of discussion solely between Imperial Russia and the Porte. In the latter year, however, in anticipation of Napoleon's invasion, Russia momentarily abandoned long range ambitions in the Balkans and, by the Treaty of Bucharest of May

[1] Martens, *Recueil des principaux traités*, etc., Göttingen, 1795, *Tome* V, Annex, p. 71. See also Cambridge Modern History, Vol. VI, p. 634, and Nicolas Iorga, A History of Romania, London, 1925, p. 186.

[2] The texts of the Treaty of Bucharest and its accompanying Military Convention are given in English translation in Charles Upson Clark's Greater Roumania, New York, 1922, pp. 171–177. The territories ceded are carefully defined in Article IV of the treaty.

[3] "Austria renounces, so far as she is concerned, in favour of Romania all rights and title over such portion of the former Duchy of Bukovina as lies within the frontiers of Romania which may ultimately be fixed by the Principal Allied and Associated Powers." For the text see this JOURNAL, Vol. 14 (1920), Supplement, p. 22.

[4] Treaty between the British Empire and Principal Allied and Associated Powers and Poland, Romania, the Serb-Croat-Slovene State and the Czecho-Slovak State relative to certain frontiers of these States, Sèvres, August 10, 1920; Great Britain, Treaty Series, No. 20, 1921; British and Foreign State Papers, Vol. CXIII (1920), pp. 866–872; see also this JOURNAL, Vol. 16 (1922), Supplement, pp. 148–153.

[5] Except in the fugitive propagandist literature looking to the creation of an enlarged federative Poland or a "Carpathian Switzerland," partly Hungarian, partly Romanian and partly Ruthene, no other governmentally sponsored claim to the Bukovina appears to have been put forward save by the Governments of the Western Ukrainian Republic, the [Eastern] Ukrainian Democratic Republic and the Ukrainian Soviet Republic. As none of these was actually recognized by the Principal Allied and Associated Powers, their claims were not seriously considered. It does not appear that during 1919 and 1920 the RSFSR put forward any claim of its own to the Bukovina.

16/28, 1812,[6] obtained from the Porte the eastern half of Moldavia, between the Pruth and Dniester rivers (which, for all practical purposes, constitutes the area historically known as Bessarabia). Although there were minor modifications of the southwestern frontiers in 1856 and 1867 the area retained its designation throughout the period of Russian domination, down to the fourth year of World War I.

In the course of the general decomposition of the Russian Empire which followed the Bolshevik *coup d'etat* of November 7, 1917, Bessarabia was caught up in the welter of separatist agitation and successively claimed territorial autonomy, proclaimed itself the Moldavian Democratic Republic and finally voted its annexation to the Kingdom of Romania.[7] All these acts were "revolutionary" in relation to the constitutional norms of Tsarist Russia, and undoubtedly altered to Romania's advantage and the disadvantage of the Russian State the territorial status of, and inferentially the legal title to, Bessarabia. Finally, the Principal Allied Powers gave a tincture of legality to the process of acquisition of Bessarabia by the Treaty of Paris of October 28, 1920,[8] concluded at the very end of Allied intervention in Russia. Its phraseology is redolent of the period and attempted to make legal an *ex parte* judgment on the merits and validity of Romania's claims. By contrast, the RSFSR, the Ukrainian SSR and, after its formation, the USSR, enunciated, reiterated, and consistently maintained a policy of non-

[6] See British and Foreign State Papers, Vol. XIII (1826), pp. 908–914.

[7] For detailed accounts of this internal evolution see Charles Upson Clark, Bessarabia, New York, 1927, Chapters XIII–XXV, as also the excellent bibliography attached to the volume and his Greater Romania Chapter XI, pp. 102–120. Shorter treatments from a non-Romanian standpoint are found in A. L. P. Dennis, Foreign Policies of Soviet Russia, New York, 1924, Chapter VII, "Soviet Russia, Romania and Bessarabia," pp. 165–176 and Hamilton Fish Armstrong, The New Balkans, New York, 1926, Chapter IX, "The Dispute over Bessarabia," pp. 139–160.

[8] For the text of this treaty see British and Foreign State Papers, Vol. CXII (1921), pp. 647–651; also this JOURNAL, Vol. 17 (1923), Supplement, pp. 7–11. The Commission entrusted with Jugoslav and Romanian affairs at the Paris Peace Conference apparently reported to the Supreme Council as early as April 6, 1919, a recommendation favoring the incorporation of Bessarabia in Romania; in March, 1920, the Supreme Council notified the Romanian Government that "After taking into full consideration the general aspirations of the populations of Bessarabia and the Moldavian character of that region from the geographical and ethnographical points of view, as well as the historic and economic arguments," the Principal Allied Powers were ready to pronounce themselves in favor of the reunion of Bessarabia with Romania which had by that time been formally declared by the Bessarabian representatives, and were desirous "to conclude a treaty in recognition of this as soon as the conditions stated have been carried out" (Armstrong, work cited, pp. 148–149). In the preamble to the treaty it was declared that "in the interests of general peace in Europe" it was "of importance to assure henceforth a sovereignty over Bessarabia in accordance with the aspirations of the population, and guaranteeing to its racial, religious and linguistic minorities the protection which is due them"; that from geographic, ethnographic, historic and economic points of view the reunion of Bessarabia to Romania was fully justified and that the population of Bessarabia had given proof of its desire to see Bessarabia reunited to Romania.

recognition of the validity of the territorial change which is almost unique in Soviet annals. The stand of the USSR was tacitly accepted by many other countries such as the United States, which regarded the Bessarabian treaty as involving a *res inter alios acta*, which lacked the all-essential element of Russian consent.

On this exiguous legal basis Romanian possession of Bessarabia continued down to 1940, notwithstanding various transactional arrangements for a *de facto* patrol of the Dniester by a mixed commission, and the avowal of the Soviet Government, in inviting Romania to implement through the Litvinov Protocol of February 9, 1929, the General Act for the Renunciation of War, that the Bessarabian question was not closed thereby, the USSR interpreting the Protocol as meaning not a renunciation of title but a renunciation of means. From November 7, 1917 to June 28, 1940, then, Bessarabia was historically cast in the role of a buffer against Bolshevism.[9]

As France capitulated to Germany in June, 1940, the USSR endeavored to fend off the danger of an immediate clash with the Third Reich by occupying completely the broad zone of strategic territory from the Gulf of Finland to the Black Sea. The Polish and Finnish sectors were already in Soviet hands as a result of the Treaty of Mutual Friendship and Convention on the Subject of Frontiers signed at Moscow September 28, 1939, and the Treaty of Peace signed at Moscow on March 13, 1940, at the close of the first Russo-Finnish war. The Baltic sector was secured by a frank and undisguised occupation, the treaties of Mutual Assistance concluded in Moscow with Estonia, Latvia, and Lithuania in September and October 1939 having failed to work as anticipated by the Kremlin.[10] The remaining segment along the long arc of Russo-German contacts in Eastern Europe comprised the Bukovina and Bessarabia. To the former the Soviet Union had no historical claim, inasmuch as the several occupations of the Danubian Principalities by Imperial Russia never touched Austrian territory, and the temporary occupation of the Bukovina by Russian armies in World War I effected no change in title. The guiding political considerations behind the subsequent Soviet moves were dual—to prevent the formation or existence, between Eastern Galicia and the rest of the Ukrainian-inhabited lands in the Soviet Union, of any Piedmont for the dissemination of fascist ideology by the Ruthenes of Northern Bukovina, and to obtain territorial compensation for the losses suffered by the USSR in being deprived for twenty-two years of possession of

[9] The very language of Article 9 of the Bessarabian Treaty illustrates this: "The high contracting parties will invite Russia to adhere to the present treaty as soon as a Russian Government recognized by them shall be in existence. They reserve the right to submit to the arbitration of the Council of the League of Nations all questions which the Russian Government may raise respecting the details of this treaty, it being understood that the frontiers defined in the present treaty, as well as the sovereignty of Romania over the territories therein comprised, cannot be called in question."

[10] Such was the admission of Molotov in his address before the Supreme Soviet of the USSR on August 1, 1940. See Moscow News, 10th year, No. 31, pp. 2–3 (August 2, 1940).

Bessarabia.[11] The basic consideration was, however, strategic: the USSR could not afford to have the Bukovina obtrude, as a threatening military salient, between Western and Eastern Ukraine.

The USSR enforced its demands by ultimatum, and Romania formally acquiesced, in an exchange of notes,[12] before the Soviet military occupation of both areas began. The new status, irrespective of all preceding legality or subsequent constitutional evolution, was therefore, from an international legal standpoint, based on a formal agreement contained in an exchange of notes, consenting to the retrocession of Bessarabia and the cession of the North Bukovina. By July, 1940, Bessarabia and the Bukovina occupied a pivotal role in the geo-strategy of Eastern Europe as the left anchors of Soviet defense against the Axis coalition. In the process of effecting this readjustment of frontiers the unification of the Ukrainian inhabited lands was markedly advanced at Romania's expense.

The third stage in the problem was reached exactly a year later when Romania, under Axis influence, sought to better her fortunes by declaring war on the USSR,[13] and repossessing the areas reluctantly ceded in 1940. The evidence is overwhelmingly clear that the major partners in the Axis

[11] "The Government of the USSR" declared Molotov to Davidescu, the Romanian Minister in Moscow, on June 26, 1940, "considers that the question of the restoration of Bessarabia is organically bound with the question of transfer to the Soviet Union of that part of Bukovina of which the population in its overwhelming majority is bound to the Soviet Ukraine by the unity of historic destinies as well as by unity of language and national composition. This act would be all the more just, in that the transfer of Northern Bukovina to the Soviet Union could constitute in only an insignificant degree, it is true, a means of compensation for the tremendous damage inflicted on the Soviet Union and the population of Bessarabia by twenty-two years of Romanian domination in Bessarabia": New York Times, June 29, 1940, p. 8, col. 4.

[12] The Soviet ultimatum of June 26 addressed by Molotov to Davidescu bluntly proposed "(1) to restore Bessarabia to the Soviet Union, (2) to transfer to the Soviet Union Northern Bukovina within the boundaries shown on the accompanying map." "The Government of the USSR hopes," added the ultimatum, "that the Royal Government of Romania will accept these proposals and thus create the possibility of peaceful settlement of the protracted conflict between the USSR and Romania." In its reply of June 28, 1940, the Romanian Government declared through Davidescu to Molotov: "To preserve the possibility of avoiding serious consequences which would result from the application of force and the outbreak of hostilities in this part of Europe, the Romanian Government finds itself obliged to accept the conditions of evacuation contained in the Soviet [note]." For the full texts of the correspondence see New York Times, June 29, 1940, page 8, cols. 4–8.

[13] According to David J. Dallin, Romania's declaration of war was made on June 22, 1941. "It was accompanied by an order of General Antonescu to the Romanian army stating: 'Free your oppressed brothers from the yoke of Bolshevism; bring all Bessarabia, and the woods of Bukovina, your fields and meadows, back into the fatherland': Soviet Russia's Foreign Policy, 1939–1942, New Haven, 1942, p. 378. According to the Department of State Bulletin, Vol. V, No. 130 (December 20, 1941), p. 556, "No record of a formal declaration of war has been found," although the chargé d'affaires of the Romanian Legation in Washington declared to the press on June 22, 1941, that "the Romanian army is acting today to liberate and recover Romanian national patrimony overrun without justification by the unprovoked aggression of Communist Russia": New York Times, June 23, 1941. p. 7.

offered Bessarabia as a territorial bait, which doubtless loomed larger in Romanian eyes than much of the New Order. Within a month of the outbreak of the Romano-Soviet war Bessarabia and the Bukovina were back in Romanian hands.[14] From the Romanian standpoint, war having broken all peacetime juridical ties to the USSR, Bessarabia and Northern Bukovina reverted to the *status quo ante* June 28, 1940.[15] From the standpoint of the USSR they were merely areas of the Soviet Union under enemy occupation.

From July, 1941, to the spring of 1944 the situation remained unchanged. The geopolitical function of the two areas during this period was, however, a much less exalted one than that which they occupied during the crucial year from June, 1940, to June, 1941. Instead of being anchor points of Soviet strategy, they were reduced to a *Dienstknecht* role in the German *Etappengebiet.* With the recovery of Bessarabia and Northern Bukovina in the Spring of 1944, it was Russia's turn to consider the repossessed areas as reverting, alike in fact and in law, to the position which they occupied after June 28, 1940.[16] Any territory occupied thereafter at the expense of Romania remains in indeterminate status pending the formal decision of the general territorial settlement at the close of hostilities. Meanwhile the USSR has taken the juridical standpoint—perfectly tenable by a victor—that the fact of Romania's recent declaration of war [17] on her former Axis associates operates to render null and void the Vienna settlement of 1940.[18] Thus the integral return to Romania of the portions of Transylvania surrendered to Hungary restores to the harassed Romanians their Trianon boundaries of 1920, which possess high communications value. Meanwhile, the Soviet Union has given reiterated assurances that it has "no intention of acquiring any part of Romanian territory or changing its social structure,

[14] According to a Bucharest despatch of July 15 to the New York Times the Vice-Premier of Romania announced the liberation of Bessarabia and Northern Bukovina from Soviet rule. New York Times, July 16, 1941, p. 6, col. 2.

[15] According to Dallin (work cited, p. 357), as early as February, 1941, General Antonescu appointed prefects for Soviet-occupied Bessarabia. This was obviously intended to restore not merely the international but the constitutional and administrative *status quo ante* in the regions ceded in 1940.

[16] In a statement by Charles Davila, formerly Romanian Minister to the United States, carried by the Associated Press, it is asserted that "the terms of Romania's surrender . . . provide that Romania shall cede Bessarabia and Northern Bukovina to Russia, areas claimed by Russia as legally part of its territory for several years": Los Angeles Times, August 26, 1944, page 1, col. 4. Despite the loose language used in the despatch the tenacity of the Russian viewpoint is obvious.

[17] "The declaration of war against Germany, fulfilling the Russian prerequisite for acceptance of the Romanian offer to change to the Allies' side" came in a royal proclamation on August 25, 1944, setting forth various German acts of aggression "which occurred simultaneously in various parts of the country" in consequence of which "Germany has placed herself in a state of war with Romania." New York Times, August 26, 1944.

[18] New York Times, August 24, 1944; London United Press despatches of August 25, 1944, in the Los Angeles Times, August 26, 1944, p. 6, col. 4.

or of infringing by any means on the independence of Romania." [19] In the light of these pledges it appears that Bessarabia and North Bukovina are viewed by the Kremlin as reverting to the anchor position in the strategic plans of the USSR which they occupied in 1940 and 1941.

MALBONE W. GRAHAM

COMPULSORY INTERNATIONAL ADJUDICATION AND MAINTENANCE OF PEACE

While it is still too early to draw up a detailed blue-print of post-war international organization there seems to be substantial agreement among statesmen and writers on the necessity for the creation of a general international organization of which an international court of justice shall form an important part. Many writers and proposals insist on compulsory jurisdiction for this Court.[1] But no writer has pressed this view with more vigor than Hans Kelsen.[2] Coming from a leading protagonist of democracy and peace, a person who, as a scholar, is one of the greatest jurists of the century, these ideas deserve careful study.

Generally speaking, Kelsen's reasoning and arguments in favor of compulsory international adjudication are theoretically faultless and carry great weight: 1) Conditions at the present juncture in world history make any attempt at the creation of a world state or world federal state wholly utopian; the only politically possible solution must be sought within the framework of international law and must be compatible with the principle of the "sovereign equality" of states, as laid down by the Moscow Declaration. The only non-utopian goal is, therefore, the establishment of an international court with compulsory jurisdiction. 2) This achievement would constitute not only the first step in time, but the most important step, toward making the present primitive international law a more advanced legal order. As long as states—and here Kelsen points to the very crux of the problem—are legally free to determine the question of right and wrong by themselves, as long as each state is *judex in causa sua*, as long as there is no impartial and objective judicial decision, the basic question of right and wrong cannot be answered with juridical authenticity. 3) The decision of right and wrong by impartial and objective judicial judgment would constitute the greatest advance in world history even if the court could not execute its judgment

[19] In an official statement broadcast by the Moscow Radio on August 25, 1944, Foreign Commissar Molotov re-stated a pledge made by the USSR to Romania when the first moves for armistice were made in April, 1944, substantially in the terms quoted. Los Angeles Times, August 26, 1944, p. 1, col. 4.

[1] Cf. the Statement: "The International Law of the Future," in this JOURNAL, Vol. 38 (1944), Supplement, p. 123 (Proposal 17).

[2] Law and Peace in International Relations, Cambridge, Mass., 1942, pp. 145–168. See further this JOURNAL, Vol. 37, pp. 397–406; Am. Judic. Soc., Procs., Vol. 46, p. 571. "Peace Through Law", Journal of Legal and Political Sociology, Vol. 2 (1943), p. 52; article in Yale Law Journal, Vol. 53, pp. 207–220; also The Legal Process and International Order, London, 1935.

by force. The cry for an international police force rather than judicial action is not only politically utopian [3] but also theoretically untenable: there can be no execution before there is a judgment. "One cannot bring to perfection the process of implementing the sanction of the law through its centralization, while leaving the first phase, i.e. determination of the fact of wrong in a condition of utter primitiveness." [4] 4) In municipal law, also, courts preceded legislatures. By analogy compulsory international adjudication corresponds to the law of historical evolution.[5] 5) The pragmatic argument points in the same direction: arbitration has been widely accepted already by sovereign states, here majority decisions have proven possible, arbitration has actually been effective, judicial decisions have overwhelmingly been carried out *bona fide* by the states; the creation of compulsory international adjudication is, therefore, "the line of least resistance."

It is with regard to this last point that Kelsen seems to this writer to be over-optimistic. What he says concerning the effectiveness of arbitration is true, but under *optional* arbitration. *Compulsory* adjudication, even if restricted to "legal" disputes, might be a very different matter. For the cause of compulsory adjudication, even of only "legal" disputes, has unfortunately not made very great advances, either prior or subsequent to the first World War,[6] either at the Hague or in the League of Nations or in Pan-American developments. Even under compulsory arbitration treaties far-reaching reservations are accepted; even Argentina, the protagonist of *"arbitraje amplio"* has a favorite very broad reservation: constitutional questions. It is unfortunately a fact that the great majority of international judicial decisions, prior and subsequent to the first World War, were given on conflicts of relatively minor importance.[7] The Interamerican Treaty of Washington of 1929 has not yet been applied a single time. When the United States proposed in 1940 to submit the strictly legal question of the conformity with international law *vel non* of the Mexican oil expropriations to an international Court Mexico refused.

As for the acceptance by the states of compulsory international adjudication, there is no logical, legal, or theoretical difficulty; the difficulty is wholly political. And this political difficulty of persuading the sovereign states, is, we believe, underestimated by Kelsen. For the same reason it seems to this writer that Kelsen's proposal, contrary to the Covenant of the

[3] Cf. the President's Statement: "We are not thinking of a super-state with its own police force and other paraphernalia of coercive power" (New York Times, June 16, 1944, p. 12).

[4] The Legal Process, etc., p. 23.

[5] Kelsen's historical argument was made use of by Uruguay at the Lima Conference in its proposal for international adjudication (*"inspirándose en aquel concepto básico que enunciaba Kelsen"; Octava Conferencia Internacional Americana, Lima, 1938. Diário de Sesiones,* Lima, 1939, p. 141).

[6] H. Lauterpacht: The Function of Law in the International Community, Oxford, 1933, in general. Also D. Schindler in Hague Academy of International Law, *Recueil des Cours,* Vol. 25, pp. 235–364.

[7] Lauterpacht's: *"De maximis non curat praetor."*

League, to place the Court in the center of a new international organization (which would not be based on the principle of universality, which would have no duties of international coöperation in non-political fields, but merely be a Permanent League for the Maintenance of Peace), so that its Council would only be a subsidiary organ of the Court, a sheriff, which, at the Court's order, would execute the Court's judgments, has not the slightest chance of being realized.[8]

These remarks touch only political estimates as to practical possibilities. But Kelsen goes farther than any other writer by demanding compulsory international adjudication of all international conflicts of whatever nature and without any reservation or exception. Here again Kelsen seems to be over-optimistic as to the chance that this postulate may be accepted by the states. There are no multilateral treaties, down to the present time, which go this far. Even proposals to this effect are very rare.[9] Bilateral treaties of this type are equally rare; a number of such treaties exist but contain very important reservations. The objection to the proposal of compulsory international adjudication over *all* conflicts is, moreover, not only a political, but also a theoretical one.

Kelsen is, of course, entirely right that all the objections based on the existence of "gaps" in international law, the possibility of a "*non liquet*," the deficiency or inadequacy of present-day international law, are theoretically entirely untenable, insofar as they lead to the conclusion that it would not be logically possible to give a judicial decision on any conceivable international conflict of whatever nature. He is entirely right that no objective criterion as to the nature of international conflicts can be found, with regard to the question of their justiciability *vel non*.[10] It is necessarily true that every conflict can be decided according to positive international law, at least by giving judgment in favor of the defendant and dismissing a state's claim when the latter cannot be founded on a norm of positive international law. It is also true that a court will adapt the positive law to its idea of justice and equity.

But our problem is not whether any conflict can be decided, but whether it can be settled. In this respect we must distinguish between international

[8] Cf. Prime Minister Churchill's speech in the House of Commons of May 24, 1944, in which he strongly underlined his reliance on superior power and on a "world-controlling Council, comprising the greatest states which emerge victorious from this war, to prevent wars and enforce peace." (New York Times, May 25, 1944, pp. 12, 13.) Cf. also the statement by the President of the United States (same, June 16, 1944, p. 12).

[9] Cf. the proposals by Uruguay and Mexico at the Lima Conference (*Diário de Sesiones*, Lima, 1939, pp. 114–140, 140–142).

[10] The formula of the Taft-Knox Treaties of 1911, characterizing such conflicts as "justiciable" in their nature "by reason of being susceptible of decision by the application of the principles of law and equity," is certainly theoretically untenable. Little can also be said in favor of the enumeration method. The distinction between "legal" and "political" conflicts with regard to the importance of the matter in controversy is equally untenable.

conflicts as to what the law is and conflicts as to what the law should be.[11] But this distinction, based, as it is, on a subjective criterion, is violently attacked by Kelsen. States, he says, must be obligated to treat all their conflicts as legal conflicts, like citizens. And he adds that compulsory international adjudication is perhaps the most efficient means of maintaining positive international law.

But the possibility that states, contrary to citizens, may advance metajuridical arguments in a conflict—"such as justice and the like," as Kelsen says— is first a consequence of the fact that states are not only the executors of positive international law, but also the makers of new international law; in consequence conflicts may arise between them in both their capacities. Furthermore, citizens are not obligated to treat all their conflicts as legal conflicts; in some of the bitterest conflicts courts could do nothing; positive law as a guarantee of peace must not be overestimated. Citizens are only obligated not to resort to force; but they may settle their conflicts out of court and they are free to leave them unsettled. The basic obligation of states must be not to resort to force; they are free to leave their conflicts unsettled; but if they want to settle them they must settle them by peaceful means, whether the conflicts involve the law that is or the law that should be.

But the peaceful means of settling these two types of conflicts are different in municipal law too. Within a state bitter political conflicts arise; they can be decided, but not settled, by the courts. The means of settling them consists in changing the law by legislation, or, if necessary, by constitutional amendments. Where such means of peaceful change do not exist or do not work, political conflicts may lead to revolution or civil war. Could any one imagine the courts of the United States to have abolished the XVIIIth Amendment? Courts are wholly unfit and unequipped for changing the law, just as political agencies are unfit for giving objective and impartial decisions. "It would not only be illogical but dangerous to submit to an ordinary procedure differences with regard to a change in the rules of law in force." [12] It is very true that courts do not merely "apply" the positive law automatically; it is very true, both in common law and in civil law countries, that the judicial activity necessarily is also law-creating, that the courts inevitably bring about a gradual evolution of the law. But the distinction between judicial and legislative functions remains, nevertheless, fundamental. "Judges do and must legislate, but they can do so only interstitially, they are confined from molar to molecular motions." [13] But the degree of change, as between "almost imperceptible" and "drastic change" of the positive law, is not the basic difference between judicial and legislative function; the basic difference is that legislatures create abstract and general,

[11] Cf. M. Huber in *Annuaire de l'Institut de Droit International*, Vol. XXXIII, p. 262.

[12] M. Habicht, The Power of the International Judge to give a decision *ex aequo et bono*, London, 1935, p. 80.

[13] Justice O. W. Holmes in Southern Pacific Co. v. Jensen, 1917, 244 U. S. 205, 221.

judges concrete and individual norms, that the judge is bound by the hierarchically superior general norms, that not only the procedure, but the contents of his decision is to a large extent legally prescribed; that the judge is much less free than the legislator, that the field of judicial, law-creating interpretation, however extended it may be, is always limited, although not entirely determined, by the existing juridical materials, as Justice Cardozo so often underlined. True, the establishment of an international legislature is at this time utopian; that is why quasi-legislative substitutes are necessary, but not decisions by courts. Let us not forget that the necessity for settling disputes, not by courts, but by other procedures, is by no means restricted to the sphere of international law. Modern labor law furnishes analogies, as in the settlement of disputes between employers and workers.

Compulsory international adjudication, says Kelsen, is perhaps the most efficient means of maintaining the positive law. But, apart from the question of the possibility of freezing the *status quo* against drastic changes in a continuously changing world, the question arises as to whether the positive law deserves to be maintained? Justice under the law is one problem, but justice in law another. Kelsen does not ask what the content of the positive law is nor how it was brought about. But if the positive law is unjust and no other solution is available but judicial decision exactly under this positive law then either we will see a perpetuation of tyranny or a resort to force.

The goal cannot be to look for the most efficient means of maintaining positive law *à tout prix*, but of maintaining peace, which is itself a dynamic conception. Kelsen's idea that war can be eliminated by compulsory international adjudication alone, is based on his unwillingness to recognize the double function of war in the present primitive international legal order. Kelsen is strongly inclined to consider *bellum justum* a positive norm of international law, although he concedes that it cannot be proved to be such. *Bellum justum* never was a legal, but a religious problem, the problem of making it possible for a Catholic to participate in a war without committing a sin. But not religious, moral, or political, but logical considerations lead Kelsen to this position. Force, he says, can appear in a legal order only as a sanction or as a condition of a sanction (as "illegal act"). War, therefore, is either a primitive sanction, to enforce the law, or an illegal act. Consequently the elimination of war is possible through compulsory international adjudication.

But it must not be overlooked that in every legal order, municipal or international, law can be created, either in conformity with or contrary to the positive law, prescribing the creation of new law. True, from the point of view of the positive law, revolution can only be conceived as an illegal act; but, nevertheless, a successful revolution creates a new positive law: *ex injuria jus fit.*

The situation is exactly the same in international law. War functions either as a primitive sanction to enforce the positive law, comparable to

blood-feud, or as a revolutionary means of changing the law. To eliminate war we must find substitutes for both its functions.

In the last analysis Kelsen's position stems from his impatience with emotions: he demands positive law, not "nebulous justice." When Kelsen started his great theoretical work he found what posed as legal science to be a hodge-podge of subjective, political, ideological considerations. He wanted to create a real science of law. This he did with his first *magnum opus* in 1911. The pure theory of law, *monumentum aere perennius*, overcoming both the factual,. sociological and the ideological *jus naturae* approach, created an objective legal science. Here, in the theory of juridical cognition, in the systematic exposition of the logical *a priori* elements of all possible positive law, in the realm of the "pure forms of law," values have no place.

But in the realm of the politics of law it is not possible to ban the conception of justice. Whether values are, philosophically speaking, mere illusions, whether there are eternal, objective, self-evident or merely subjective, relative values, whether justice is a wholly irrational, emotional conception, not accessible to human reason, or not, it is a fact that they do play the greatest role in individual, national, and international life. The greatest internal conflicts, the greatest wars, were not conflicts as to what the law is, but conflicts as to what the law should be. The feeling of injustice is one of the strongest human emotions, and if men or nations see no peaceful way out, they may rise and resort to force, even if they have to perish.

Compulsory international adjudication is of the utmost importance, should be the object of our greatest efforts, would constitute the greatest, the deepest single advance. But it alone cannot eliminate war; it can decide, but not settle all conflicts. It is an illusion to believe that it ever will be possible to transform world history into nothing but a court procedure. In the science and application of law there must be objectivity, justice under the law. But in politics, in the politics of law, in the making of law, justice in law cannot be banned. What the Latin verse says of nature, is equally true of Justice: *Justitiam expellas furca, tamen usque recurret.*

JOSEF L. KUNZ

CONSTITUTIONAL PROCEDURE IN THE UNITED STATES FOR CARRYING OUT OBLIGATIONS FOR MILITARY SANCTIONS

Among the important problems connected with American participation in international organization is that of the constitutional power of the President to use American forces for international policing purposes. Promptness and certainty of action are essential if such policing is to have a deterrent or preventive effect. If it were necessary to gain Congressional consent in each instance where force was needed these characteristics would be lacking and other countries, whether contemplating aggression or fearing that they might be the victims of aggression, would not have confidence that American participation would be forthcoming.

An international force directly recruited by the Council of the General

International Organization with its own General Staff subject to the authority of the Council itself would escape this constitutional difficulty. There would be no question of the power of the President to authorize an American representative on the Council to vote for the use of such a force in fulfilment of obligations undertaken in the instrument establishing the General International Organization. Such an international force, however, while adequate to deal with minor incidents of the type likely to be faced in the first decade after the war, would be too small to deal with a major threat to the peace. It is, of course, to be hoped that the capacity of the organization to act promptly will prevent such major threats from arising. Nevertheless, such a contingency should be provided for and consequently, even if an international force is established, provision should be made for the use of contingents of armed forces from the member states. The question therefore arises as to what, if the United States were to assume obligations for the use of its armed forces for the suppression of aggression, would be the Constitutional procedure for carrying out such obligations?

I. POWER OF THE PRESIDENT TO COMMIT THE UNITED STATES TO PARTICIPATION IN MILITARY SANCTIONS

There can be no doubt that the United States can legally assume such obligations. The United States is a sovereign state and can exercise its sovereignty to assume any kind of obligation which is not contrary to the powers of sovereign states under international law. The assumption of obligations of alliance, guarantee, mutual assistance, collective security, and sanctions has been habitual among states and so long as these obligations aim to maintain international law and not to deprive other states of rights under international law they are undoubtedly consistent with that law. It is also clear that the federal government has power without any limitations from the "reserved powers" of the states to assume obligations on any subject within the sphere of international relations.[1] In respect to foreign affairs the federal government has been held to exercise the sovereignty of the United States.[2]

If such obligations are to be assumed the problems must be faced (a) what is the proper constitutional procedure for assuming them, and (b) what is the proper procedure for carrying them out once they are assumed?

These two questions are related because the President, as the representative authority of the United States responsible for diplomatic relations, has power to commit the United States to any international obligation which the United States might undertake provided he has reasonable assurance that the obligation will be carried out. The President would be violating his Constitutional duties if he committed the good faith of the United States without

[1] Geofroy *v.* Riggs, 1890, 133 U. S. 258; Q. Wright, Control of American Foreign Relations, New York, 1922, pp. 121–6, 247–8.

[2] U. S. *v.* Curtiss-Wright Company, 1936, 299 U. S. 304, 1936.

sufficient grounds for confidence that he could rely on the collaboration to fulfill the obligation of whatever other organs of the Government are necessary for that purpose.[3] The Senate Foreign Relations Committee at one time reported that "whenever affirmative action of either the Executive or the Legislative branch of the Government may involve a call upon the assistance of the other, the branch about to take action should, if possible, first obtain indications of the other's desire." [4]

For this reason the President must know what procedures are Constitutionally permissible for carrying out an obligation, and must be assured that certain of these procedures will be practicable before he enters into the agreement. The Constitutional procedure for carrying out an obligation must, therefore, be considered prior to decision upon the appropriate Constitutional procedure for assuming the obligation.

II. POWER OF THE PRESIDENT TO AUTHORIZE MILITARY SANCTIONS UNDER THE CONSTITUTION

The President as Commander-in-Chief of the Army and Navy has Constitutional power to order the movement of armed forces to any place in the world and to order them into action in time of peace as well as war. He, however, is under an obligation not to use this power except to accomplish purposes provided by law. Under his constitutional duty to "take care that the laws be faithfully executed" he is not only authorized, but obliged, to use his power as Commander-in-Chief, as well as his powers as the Executive Department and as the representative authority in international relations, to execute the laws. The law may be found in the Constitution itself, in acts of Congress made in pursuance thereof, or in treaties made under the authority of the United States, all of which are declared to be the supreme law of the land by Article 6 of the Constitution. It has been suggested that since international law is part of the law of the land and since the President is obliged to see that the laws are faithfully executed, the President may have authority to use the forces in order to enforce international law.[5] The act of June 18, 1878 by which Congress made it unlawful and a penal offense "to employ any part of the Army of the United States as a *posse commitatus* or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by an act of Congress" does not effect authorizations which can be legitimately deduced from the terms of the Constitution or general acts of Congress.[6]

[3] Q. Wright, The United States and International Agreements, this JOURNAL, Vol. 38 (1944), p. 348.

[4] 54th Congress, Second Session, Senate Document 56, p. 5; Q. Wright, Control of American Foreign Relations, p. 346.

[5] J. Reuben Clark, Right to Protect Citizens in Foreign Countries by Landing Forces, Washington, 1934 (third revised, ed.), p. 45.

[6] 20 Stat. 152, section 15; see Q. Wright, work cited, p. 192.

The President can employ the armed forces but only Congress can declare war. A state of war is a legal condition prevailing through a period of time during which special rules of international law are in effect. These rules permit not only the use of armed force against the enemy but also interference with both enemy and neutral commerce at sea and with enemy property, suspension or termination of treaties with the enemy state, and other actions specified in the international law of war and neutrality. A state of war is therefore something quite different from the use of armed force. The Supreme Court has distinguished between war in the material sense and war in the legal sense.[7] The two are related not only because armed force may be and usually is employed during a "state of war" but also because the use of armed force may lead to a "state of war" through action of the foreign state which feels it is injured by such use of force. Furthermore, the act of a foreign state in declaring or otherwise initiating a "state of war" may create a situation in which the United States should use all of its belligerent powers for defense. From these relationships it has been implied (a) that in the absence of a "state of war" the President ought not to use armed force in a manner or under circumstances likely to precipitate such a state, and (b) that the President may, in his capacity of representative authority of the United States, recognize the existence of a "state of war" thrust upon the United States by the action of a foreign power or of an insurgent group and forthwith authorize the use of armed force, establish war blockades, and take other war measures in expectation that Congress will subsequently ratify his action.[8]

The Constitution states as one of its purposes the common defense, and guarantees the territory and the republican form of government of the States. It has been asserted by the Supreme Court that from the Constitution itself the President has power to use the armed forces to repel invasion and suppress domestic insurrection.[9] The Constitution also guarantees the privileges and immunities of citizens of the United States,[10] and these have been held to include the right to protection abroad.[11] The Courts have held that the President may use the armed forces in foreign territory to give such protection,[12] and the President has employed landing forces in foreign territory, naval forces on the high seas, and armed guards on national vessels to protect nationals, their property, ships, and commerce on numerous occasions.[13] The protection of agencies or property of the Government itself on the high seas or in foreign territory presents an even stronger case for the

[7] See Nelson J. dissent in The Prize Cases, 2 Black 635, 690 and The Three Friends, 166 U. S. 1. [8] Q. Wright, work cited, p. 284 ff., The Prize Cases, 2 Black, 635, 638.

[9] The Prize Cases. [10] XIVth Amendment. [11] The Slaughter House Cases, 16 Wall., 36.

[12] Durand *v.* Hollins, 1860. 4 Blatch, 451, 454; Perrin *v.* United States, 1868, 4 Ct. Cl., 543; In re Neagle, 135 U. S. 1; Wright, work cited, p. 306.

[13] J. Reuben Clark, work cited, pp. 34, 51, etc.; M. Offutt, Protection of Citizens Abroad by the Armed Forces of the United States, Baltimore, 1928. Q. Wright, work cited, 294–298.

President to authorize the use of force for protective purposes. Naval forces are under standing orders to protect themselves if attacked and to come to the assistance of embassies and consulates if requested. The President has authorized naval and military action to protect embassies, consulates, and other international agencies abroad.[14]

National territory, persons, ships, and official agencies are tangible things and there can be no question of the President's right and duty to use the armed forces to protect them when actually attacked or in immediate danger. A more difficult problem arises when more remote danger or intangible policies are the object of attack. Can the President announce in behalf of the United States such policies as the Monroe Doctrine; the Open Door in, and the territorial integrity of, China; the police power corollary of the Monroe Doctrine; the Good Neighbor policy; and United Nations solidarity against aggression, deemed to be in the interest of American defense and prosperity, and use the armed forces to maintain them? The announcement of such policies has often carried the implication that forces would be used if necessary. It would appear doubtful, however, whether the President can justify such uses of force without further authorization of law than can be found in any broad terms of the Constitution. If such policies have the object of maintaining general international law, however, the President may justify action on the ground that international law is part of the law of the land.[14a]

III. POWER OF THE PRESIDENT TO AUTHORIZE MILITARY SANCTIONS UNDER TREATY

A treaty made under the authority of the United States is supreme law of the land and constitutes an authorization for the President to use force as required by its terms. The Supreme Court has held that a treaty can enlarge the normal legislative competence of Congress under the necessary and proper clause.[15] There can be no doubt that a treaty authorizes the President to use his powers in order to carry it out. Where concrete obligations of guarantee, protection, suppression of piracy or the slave trade, or collaboration in sanctions are undertaken by treaty the President can use the armed forces to carry out the obligations subject, however, to the limitations referred to above. He ought not to use force, even when authorized by treaty, under circumstances likely to precipitate a state of war without au-

[14] Q. Wright, work cited, p. 294.

[14a] Above, note 5. International Law permits a state to use force in "self defense" only if the necessity is "instant and overwhelming" (Caroline Case, Moore, Digest, Vol. 2, Sec. 217; Q. Wright, this JOURNAL, Vol. 27 (1933), p. 44), but this limitation does not apply if the use of force has been authorized by a competent international authority (International Law of the Future, comment on Principles 7 and 8, this JOURNAL, Vol. 38 (1944), Supplement, p. 85).

[15] Neeley *v.* Henkel, 1901, 180 U. S. 109; Missouri *v.* Holland, 1920, 252 U. S. 416; Q. Wright, work cited, p. 184–186.

thorization of Congress, either by general law or by explicit resolution referring to a particular situation.

If an obligation is undertaken by treaty to engage in "war" under certain circumstances the fulfillment of such a treaty requires collaboration of Congress. It would therefore be desirable to obtain the approval of Congress by resolution prior to the ratification of such a treaty in order better to assure the collaboration of the House of Representatives in carrying out the treaty. There is no doubt that the United States may by treaty accept such obligations. Numerous treaties are only enforceable with the collaboration of Congress as, for example, every treaty which requires an appropriation.[16]

IV. POWER OF THE PRESIDENT TO AUTHORIZE MILITARY SANCTIONS UNDER ACT OF CONGRESS

An act or resolution of Congress declaring war, or authorizing the use of force in a specific instance or in described future circumstances is undoubtedly a law, if made within the delegated powers of Congress, and justifies the President in using the armed forces as therein authorized. Congress through its powers to declare war, to punish piracies and offenses against the law of nations, and to make laws necessary and proper for carrying out other powers delegated by the Constitution, can authorize the use of force to carry out any policy which it may think appropriate to the general purposes of the Constitution. Congress has the power to declare war for any purpose whatever and this has been thought to justify lesser authorizations to use force and uses of force in order to prevent the need for a declaration of war.[17]

While Congress cannot delegate its power to declare war it can define circumstances in which the President may use the armed forces, and these circumstances need not be confined to an existing situation but may be stated in general terms applicable in the future. Thus Congress early authorized the use by the President of the militia, the army, and the navy to repel invasion, to suppress insurrection, and to execute the laws of the Union.[18] While Congress could not authorize the use of the militia for any other purposes than these three, which are specified in the Constitution itself, Congress could authorize the use of the army and navy for purposes of international policing, suppression of piracy, or prevention or suppression of offences against the law of nations, such as international aggression.[19]

V. CONCLUSION

In view of these circumstances it is believed that, if Congress should pass a joint resolution authorizing the President to use the armed forces in col-

[16] Q. Wright, work cited, pp. 257, 353 ff.

[17] Congressman Bailey in House of Representatives, Jan. 7, 1845, Cong. Globe, Vol. 14, p. 102. But see Clark, work cited, p. 40.

[18] Q. Wright, work cited, p. 186.

[19] Q. Wright, work cited, pp. 100, 179–189. Numerous acts authorizing the President to use force are indicated by Clark, work cited, p. 41.

laboration with other countries to suppress acts found by an appropriate procedure of the United Nations to constitute aggression contrary to international law, the President would be warranted in committing the United States by executive agreement to such collaboration. It would, of course, be understood that if the circumstances were such that the use of armed force was likely to precipitate a "state of war" the President should not act without a more specific authorization by Congress unless the acts of the aggressor had in fact already precipitated a "state of war" against the United States.[20] It can be argued, on the assumption that general international law is incorporated in the national law, that the President has authority from the Constitution to use the forces to maintain international law, and consequently can enter into executive agreements concerning such uses without Congressional action.[21] Because of the possibility that use of force to suppress aggression may lead to war in the Constitutional sense, Congressional support for such agreements seems desirable.

QUINCY WRIGHT

MEXICO MEETING OF THE INTER-AMERICAN BAR ASSOCIATION

The Inter-American Bar Association held its third conference at Mexico City July 31–August 8 last in accordance with the announcement printed in the July number of the JOURNAL. The Mexican Bar Association acted as host and the delegates were welcomed by His Excellency Señor Avila Comacho, President of Mexico, and Dr. Ezequiel Padilla, Secretary of Foreign Affairs. The attendance was considerably larger than expected in view of the transportation difficulties. Some 500 delegates were registered, representing 62 member associations. Next to Mexico, the United States had the largest delegation. The American Society of International Law was represented by its President, Mr. Frederic R. Coudert, the undersigned Vice-President, and several other members. The President of the American Bar Association, the preceding President, and the President-Elect were all in attendance. Formal sessions were held in the Palace of Fine Arts and the Section meetings in the commodious rooms of the beautiful and historic Castle of Chapultepec. The meetings were all well attended and the discussions were not only animated but at times boisterous. Through faulty regulations, a few subjects of a political and diplomatic nature, which had no place on the program of a private law association, were given undue prominence, and, although the resolutions on these subjects were finally overwhelmingly defeated, for the time being the consideration of them overshadowed the real work of the meeting.

The more important resolutions which were adopted originated in the Section on Legal Education, the Committee on Communications, and the Section on Post-War Problems.

The Conference adopted recommendations of the first named Section

[20] Q. Wright, work cited, pp. 186, 192. [21] Notes 5 and 14a, above.

that certain preliminary observations on the teaching of comparative and international law be sent to the faculties of the law schools of the Americas inviting constructive suggestions with a view to stimulating interest in these subjects; that the law schools encourage the study of English in Latin America in preparation for law courses, and that the study of French, Spanish, or Portuguese be encouraged in North America; that the study of comparative American government be included in pre-legal higher education; that courses be offered in comparative constitutional history; that law reviews publish comparative analyses of legal doctrines and decisions; and that legal materials be made more available either in current periodicals or by microfilming. Other recommendations approved by the Conference call for the establishment of an association of the law schools of the Americas, and the appointment of a committee to examine commercial legislation in the Americas and draw up a program of teaching on the subject. A resolution was adopted on the freedom of teaching and academic expression, and the Inter-American Bar Association was asked to consider the means whereby these principles could be made effective in the law schools throughout America.

The Organizing Committee of the Inter-American Academy of Comparative and International Law reported that plans for the realization of this project, which was initiated at the first conference of the Association in 1941, had progressed to the point where it was possible to announce the opening of the Academy in Habana in January next, and a series of resolutions of appreciation of this accomplishment was adopted by the Conference. In view of the importance of this project, it is treated in a separate note which follows.* Encouraged no doubt by the successful planning for this Academy, resolutions were adopted by the Conference favoring the establishment of an Institute of Comparative Constitutional Law and of a permanent institute in each country of America for the study of uniformity of civil and commercial laws.

In the field of international communications resolutions were adopted urging that the Permanent American Aeronautical Commission recommended by the Lima Conference of 1937 be established at an early date and that it study the elimination of burdensome and costly restrictions and delays to passengers and cargo in regularly scheduled flights over established international air routes; that it study the feasibility of tax uniformity in respect of essential materials and equipment transported in the course of such flights; and that it consider means of providing uniform, prompt, and adequate relief and compensation for injuries to passengers and damages to freight shippers in international air transportation. The Conference also adopted recommendations from this Committee that an Inter-American Telecommunication Conference be held at an early date to which the American states should submit surveys and studies of their national plans

* Below, p. 688.

and policies in anticipation of the next World Telecommunication Conference to be held following the war; that the Inter-American Traffic Convention be signed and ratified by all interested states which have not already done so, and that consideration be given to any necessary changes in national statutes to meet the requirements of the said Convention.

The Conference established a new Section on Municipal Law to which the Executive Council referred for study a proposal for the adoption of an inter-American municipal code. The Conference also constituted a Committee on Admiralty Law.

Two resolutions on post-war reconstruction were adopted, which, in view of their importance, are reproduced textually as follows:

Resolution Concerning the Establishment of a Permanent International Organization

Be it resolved that the Inter-American Bar Association at its Third Conference, held in the City of Mexico, D. F., on August 7, 1944, declares itself to favor the following principles and program in general terms, namely:

1. That a permanent international organization be established by the nations to maintain peace by the prevention and suppression of aggressive war.
2. That this permanent international organization should include a general assembly in which all of the nations shall be equally represented.
3. That the permanent international organization should include a permanent executive agency to administer the business of the organization between sessions of the Assembly. The members of the Executive Agency shall be designated by the Assembly.
4. That the general international organization include the existing Permanent Court of International Justice, with the necessary adaptation of its Statute to the new organization, and the Court should be empowered to create chambers, special or regional, as need arises, and,
5. That the Assembly have power to create from time to time such inferior courts as may be necessary.

Resolution Concerning the Permanent Court of International Justice

That the Permanent Court of International Justice must continue to exist, linked to whatever political agency be set up after the war. It would have compulsory jurisdiction over all juridical disputes between States, in matters relating to their respective rights. Said jurisdiction would be exercised at the request of any State a party to the dispute. However, should the parties involved in the controversy agree to resort to some other procedure for peaceful settlement, the Court would have no jurisdiction until after such procedure had been exhausted without reaching a settlement of the conflict.

When drafting the statute of the Court its jurisdiction would be broadened as much as possible.

Finally the Inter-American Bar Association adopted the following resolution in homage to the late Dr. James Brown Scott, former President of

the American Society of International Law and Editor-in-Chief of this JOURNAL:

> The Third Conference of the Inter-American Bar Association, being of the considered opinion:
>
> That the eminent North-American Jurist, Mr. James Brown Scott, figured as one of the organizers of the Inter-American Bar Association and in the said capacity lent great services to our Institution;
>
> That Mr. James Brown Scott, furthermore, dedicated his praiseworthy life to the study of the science of law, especially in the international field, realizing the worthiest of labors, ever striving that the relations between peoples be governed by principles of Equity, Justice and Law and by the exclusion of force, as a system of settling the conflicts between nations;
>
> *Hereby resolves:*
>
> Filled with emotion, to render homage to the memory of this illustrious jurist and hold out the life of Mr. James Brown Scott as an example for future generations of lawyers of America.
>
> GEORGE A. FINCH

CURRENT NOTES

INTER-AMERICAN ACADEMY OF COMPARATIVE AND INTERNATIONAL LAW

The delegates in attendance at the Third Conference of the Inter-American Bar Association held at Mexico City during the first week of August last were agreeably surprised to learn from the report of the Organizing Committee of the Inter-American Academy of Comparative and International Law, submitted by its President, Dr. Ernesto Dihigo, and its Secretary, Dr. Juan Clemente Zamora, that the Academy would be formally organized and its first session held at Habana in January, 1945. The project for the establishment of such an Academy was presented at the first conference of the Inter-American Bar Association held at Habana in March, 1941, and the Organizing Committee well deserves the resolution of appreciation adopted by the conference at Mexico City last August, and especially do the Law School of Habana and its delegation to that conference deserve warm congratulations for the success achieved within the short space of three years. This success is due also in large measure to the great interest of the Government of Cuba which has by decree made the Academy an official corporation and provided an initial appropriation of $5,000 to its budget with the promise of an annual subvention of $12,000.

Therefore, due to the well-directed and energetic efforts of the Organizing Committee and the substantial help of the Government of Cuba, the first academic courses will be given at Habana January 8–15, 1945. Each course will consist of five lectures of not more than forty-five minutes, to be followed by a question period. There will also be round-table discussions on private comparative law and international public law. Each of these round tables will hold three sessions. The subjects of the lectures and round tables, as well as the professors and discussion leaders, will be announced later.

Persons interested in the Academy may obtain further information by sending an inquiry to its temporary address, the Habana Bar Association Building, Habana, Cuba. Registration of students may be made personally or by mail at any time before December 31 of this year. Applicants must be graduates of a law school or of a school of political science of a Latin American Republic, or hold from an institution of the United States or Canada an LL.B. degree or an A.B. or B.S. degree for which the major subject was political science, public law, government, or Latin American relations.

After hearing the report of the Organizing Committee at Mexico City, the Inter-American Bar Association resolved "to approach all the governments of countries of the Americas, law schools affiliated to universities, and cultural institutions that may be interested in the matter, notifying them of the creation of the Inter-American Academy of Comparative and International Law, and requesting an economic collaboration for the same." The asso-

ciation sent a cablegram to the Government of Cuba thanking it for its valuable contribution to the Academy which, the conference was convinced, "will contribute to join together the juridical ties that unite the nations of the Americas."

GEORGE A. FINCH

THE INTERNATIONAL LEGAL STATUS OF GERMANY TO BE ESTABLISHED IMMEDIATELY UPON TERMINATION OF THE WAR

I

There are, in substance, two different kinds of legal status which may be established in Germany immediately after her unconditional surrender. The first is the status of military occupation of enemy territory (*occupatio bellica*, belligerent occupation).

According to general international law and the Hague Convention of 1907, the occupant Power or Powers do not acquire sovereignty over the occupied territory. The occupant prevents the legitimate sovereign from exercising his authority but the right of the occupant is merely a right of administration and is limited by strict rules of international law as codified in Articles 42–56 of the Hague Regulations. The main principle is (Art. 43) that the occupant is obliged to respect "unless absolutely prevented, the laws in force in the country."

Military occupation of enemy territory is essentially an incident of warfare; it presupposes a state of war in the relationship between the occupant state and the state whose territory is occupied; it has by its very nature a transient character. If a fundamental reform of the political structure of Germany, a complete change of her political system and reëducation of the German people, is intended by the victorious Powers, the status of belligerent occupation is by no means an adequate basis. The measures taken by the occupant in the administration of occupied country are justified only insofar as they are necessary for the maintenance and safety of his armed forces and the realization of the purpose of war, that is, victory over the enemy. Consequently the occupant has no right to divide the country into new administrative districts for political purposes. When Germany, during the first World War, dismembered occupied Belgium by detaching the Flemish part from the rest of the country this movement was generally considered as a violation of international law. The occupant has no legal right to set up a part of the occupied territory as an independent state. This principle is important especially with respect to the terms for the reëstablishment of Austria as set forth in the Moscow Declaration and the intention to divide Germany into two or three states.

II

The refusal by the Powers in the Moscow Declaration to recognize the annexation of Austria by Germany has hardly more than a political charac-

ter. Non-recognition of the annexation means that the Powers are willing to restore a legal status which, in their opinion, has been changed illegally; but this non-recognition cannot alter the fact that at the moment of Germany's surrender the former Austrian territory will still be an integral part of the German Reich. That Austria never ceased to exist as an independent state is a political fiction which will be very difficult to maintain at the moment of Germany's surrender, since at this time no Austrian government will probably exist. Besides, maintaining this fiction will not be in the interest of the occupying Powers. One of the consequences of the non-recognition doctrine is that with the abolition of Germany's domination over the former Austrian territory the constitutional status of Austria, which prevailed at the moment of annexation, must revive automatically. In the Moscow Declaration the three Great Powers indeed assert that they consider themselves in no way bound by any changes effected in Austria since March 15, 1938, the date of the annexation. (The decisive change of Austria's legal status was not effected on March 15, but on March 13, 1938, on which date the Austrian and German Anschluss laws entered into force.) At that date Austria was a fascistic state. If the victorious powers wish to reëstablish a democratic Austria, they must not adhere too closely to the non-recognition doctrine. Even the Moscow Declaration, which proclaims that the annexation of Austria by Germany is "null and void," does not accept all the consequences of this doctrine. If Austria is legally not an intrinsic part of Germany, the former cannot be considered at war with the United States, since Austria, as such, has never declared war nor resorted to war against any of the United Nations, nor has any one of the United Nations declared war or resorted to war against Austria as such. Nevertheless, the Moscow Declaration makes Austria responsible "for participation in the war at the side of Hitlerite Germany." This shows clearly that the Powers of the Moscow Conference are not willing to apply the doctrine of the non-recognition of Austria's annexation by Germany when the application of this doctrine is incompatible with their interests.

III

The reëstablishment of an independent democratic Austria could result from a movement of the Austrian people, tolerated or even supported by the occupying Powers. From the standpoint of the laws in force at the moment of the occupation, it would be correct to consider such a movement as revolutionary. Toleration or support of a revolutionary movement of the population aiming at the separation of a part of the state is hardly compatible with the international duties of the occupant who, according to the Hague Regulations, is obliged to "take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Since the occupying Powers have not recognized the annexation they may, it is

true, consider themselves not to be bound in this particular case either by this rule or by the rule prohibiting any change of the legal status of the occupied country. But this view certainly will be contested by the German government; and it is, at least, doubtful how an impartial authority would decide this question. The reëstablishment of Austria as an independent state, as well as the other territorial changes which Germany must undergo, should be effected in a way that is legally incontestable. These changes must be carried out while German territory is still under the military control of the victorious Powers. The status of belligerent occupation, however, is not favorable to these changes.

IV

It stands to reason that occupation of Germany is legally possible also on the basis of an international treaty, especially an armistice or peace treaty concluded with Germany, and that by such a treaty the victorious Powers may acquire all the rights they need. It stands to reason, further, that such a treaty will not and cannot be concluded with the Nazi government. It could be concluded only with the new German government which will be established after the liquidation of Naziism in Germany under the effective control of the military authorities of the occupying Powers. It is, however, not very likely that any respected and reliable German will be found willing to form such a government and to assume the responsibility for all the actions requested by the victors and, in particular, for the separation of a part of German territory from the mother country, or the dismemberment of Germany, which inevitably would be interpreted as destroying national unity. Nor will it be easy to obtain from a national German Government the extradition of German officials for prosecution for violation of international law (war crimes) committee as acts of state, nor the consent necessary for such prosecution. Even if such a national government could be established its members would act under the constant threat of murder by partisans of the nationalistic underground movement which certainly will be organized after the defeat and which will be much more effective than the "Vehme" after the defeat in the first World War. Any international treaty concluded by a German government under the pressure of military occupation will certainly be declared null and void by German nationalistic propaganda. It is useless, nay, dangerous to settle national and international problems, aroused by a conflict of the dimensions of a World War, by a peace treaty imposed upon the defeated state. If a peace treaty is not the result of true negotiations—which, after this war, is practically impossible; if the peace treaty is the dictate of a victor—as any peace treaty concluded with Germany after unconditional surrender must be, then the treaty, although legally valid, is politically a farce and cannot have the specific value of a treaty which consists of the voluntary consent of the parties to the obligations conferred upon them by the treaty. If there is any lesson

which can be drawn from the experiences of the first World War, it is this: that the new, democratic government of Germany must not be charged with the political responsibility for a peace treaty which is the result of Germany's defeat, a peace treaty which probably will be much more severe than the Treaty of Versailles. It is well known that the political responsibility for the Treaty of Versailles was the main cause of the breakdown of the Weimar Republic and the rise of Naziism.

Since the future peace treaty cannot be concluded with the Nazi Government and must not be concluded with the new democratic government of Germany or the governments of any states established on former German territory, no peace treaty at all is possible. The second World War must not and cannot be terminated by, and the political system to be established after this war must not and cannot be based upon, a peace treaty concluded with an enemy which has unconditionally surrendered.

V

It is possible to terminate the war without such a peace treaty if the international legal status of Germany, to be established immediately after her unconditional surrender, does not have the character of belligerent occupation, but, rather, that of a *condominium* of the three Great Powers—the United States of America, the United Kingdom, and the Soviet Union—whose armed forces after the complete defeat of Germany will occupy her whole territory. The legal status of a so-called *condominium* is characterized by the fact that the territory involved is placed under the joint tenancy of two or more states which exercise their sovereignty conjointly over it and its inhabitants. If the territory was previously under another sovereignty, the latter is abolished and replaced by the joined sovereignty of the states establishing the *condominium*. If the territory involved is that of a belligerent, the establishment of a *condominium* over it by two or more opponents is possible only after so-called *debellatio*, that is to say, the complete destruction of the military power of the enemy, the elimination of any possible resistance on the part of the defeated state, so that wartime precariousness has ceased to exist and the conquest of the territory is firmly established.

Well-known cases of *condominium* are:

the *condominium* of Austria and Prussia over Schleswig-Holstein and Lauenburg from 1864–1866;
the *condominium* of Great Britain and Egypt over the Sudan since 1898;
the *condominium* of Great Britain and France over the New Hebrides since 1914;
the *condominium* of Austria and Hungary over Bosnia and Hercegovina from 1909–1918.

It is important to note that a *condominium* may be established as a provisional measure with the intention of later on settling definitively the status

of the territory. This was the case of the territory of Memel, which, according to Article 99 of the Treaty of Versailles, and the territory of Fiume which, according to Articles 53 and 74 of the Treaty of Trianon, were placed under the joint sovereignty of the Allied and Associated Powers until final settlement regarding these territories had been made.*

The *condominium* may be exercised either by agencies which have the character of common organs of the participating states, appointed on the basis of an agreement between these states, or by division of the territory into several districts, each of which is placed under the relatively independent administration of one of these states. But in the latter case a common organ must also exist to decide certain general questions concerning the whole territory, such as disposition of the territory and the final settlement of its legal status, especially the reëstablishment of the territory as an independent state. It is a consequence of the status of *condominium* that none of the several occupying Powers is entitled to dispose unilaterally of the territory which is under his occupation and that any essential change is possible only on the basis of a decision adopted by all the Powers exercising the *condominium* or by their common organ.

VI

After the period of *condominium* has been terminated and the sovereignty of Germany restored, Germany would *legally* be a new state. No continuity between the destroyed Nazi state and the new democratic Germany would exist. The new constitution of sovereign Germany would not be the result of a constitutional or revolutionary change in the Nazi constitution, but the beginning of a new constitutional life. Only as a new community which is connected by no legal bonds with Nazi Germany, should democratic Germany enter the international organization after this war. Division of Germany into two or three states would in any case exclude legal continuity between Nazi Germany and the new states.

VII

The advantages of establishing a status of *condominium* of the three Great Powers over Germany, instead of that of belligerent occupation, are as follows:

(1) there would be no obstacles on the part of international law to a fundamental political reorganization of Germany and the necessary changes of her territory; War crimes committed by German officials as acts of state would be prosecuted with the consent of any national German Government.

(2) no armistice or dictated peace treaty would have to be concluded with a national German government.

(3) no national government able to commit sabotage would exist;

* See L. Oppenheim, International Law, 5th ed., Vol. I (1937), pp. 351–356.

(4) legal and political responsibility for the measures taken at their command would be assumed by the authorities actually in possession of power; no sham responsibility of a national German puppet government, acting under the control of the occupant Powers, would be tolerated;

(5) the new democratic German government (or the governments of any succession states) could not be charged with the political responsibility for the political situation created by Germany's defeat.

(6) there would be no legal continuity between Nazi Germany and the new democratic Germany (or the successors) which would eventually be admitted into the future international organization.

(7) no unilateral disposition of the territory on the part of one of the Powers exercising the *condominium* could be possible.

HANS KELSEN

EXCLUSION OF POLITICAL DISPUTES FROM JUDICIAL SETTLEMENT

Since its early days the law of pacific settlement has had to grapple with the distinction between legal and political disputes. In agreeing to provisions for (more or less) obligatory arbitration, States habitually tried to except disputes which might affect their vital interests, independence, or national honor. In older treaties such exceptions were made expressly,[1] in later agreements they were disguised under formulas limiting the obligation to arbitrate to "legal disputes," [2] or to disputes "with regard to which the parties are in conflict as to their respective rights." [3] Thus the door was left open for States to object to the jurisdiction of an arbitral tribunal or of the Permanent Court of International Justice on the ground that a particular dispute was "political" or related to interests and not to rights. In raising such a defense a State might leave open the issue of its own rights and claim that the law was on its side but that it did not desire to base its contention on law alone because the interests involved in the dispute were of such importance that they could not be jeopardized by the technicalities of judicial process. In some cases a State might even be willing to go so far as to admit that it had no valid claim under the applicable law but either that the law should be changed or that it should not be applied in this particular case. Whichever contention were made would create a jurisdictional obstacle and the Court would have to pass upon the jurisdictional question. Some writers are inclined to say that in such a case the Court should reject the

[1] This JOURNAL, Vol. 2 (1908), Supplement, p. 297. Cf. H. M. Cory, Compulsory Arbitration of International Disputes, New York, 1932, pp. 51–57.

[2] Article 36 of the Statute of the Permanent Court of International Justice: this JOURNAL, Vol. 17 (1923), Supplement, p. 65. On the history of this provision see M. O. Hudson, The Permanent Court of International Justice, 1920–1942, New York, 1943, pp. 189–193, 456–464.

[3] Locarno Arbitration Treaties, Article 1, this JOURNAL, Vol. 20 (1926), Supplement, pp. 26, 30, 31, 32.

contention of non-justiciability on the ground that all disputes are legal and relate to the parties' rights, and that a party which cannot prove the existence of any rule in its favor will just lose the case.[4] Such an approach might dispose of the case but it would hardly dispose of the dispute. In municipal law the action of courts is tempered by legislation and a rule of law which proves unjust in practice can be easily amended. In the international sphere the legislative processes are still very primitive and a ruling of a court based on law but otherwise unjust can only with great difficulty be remedied by a legislative enactment. Hence the power of the international tribunals has to be circumscribed in such a way as to avoid too many unjust decisions. In the light of such considerations the limitation of an international court's jurisdiction to disputes in which both parties are willing to contest their respective rights on legal grounds would appear to be a means of alleviating the rigidity of obligatory arbitration clauses and of avoiding a miscarriage of justice.

One may wonder, however, whether the current legal disputes formulae are any better than the old formula referring to independence or national honor. Both imply that a party may, at its discretion, withdraw a dispute from the sphere of obligatory jurisdiction by advancing an objection that the dispute endangers its independence or is not a dispute over legal issues. Some defendants of the new formula might point out that different modern treaties, including the Statute of the Permanent Court of International Justice, give power to the Court to decide any dispute with respect to its jurisdiction, and thus take the matter away from the objecting party.[5] Only in cases where a party raises political issues in the form of legal claims, however, is some leeway left to the Court. Once a party is willing to abandon its legal rights, and contents itself with emphasizing the political claims involved, the Court will have to decide that the dispute is not legal and declare itself without jurisdiction. Any other interpretation of the jurisdictional clause would be tantamount to conferring upon the Court the power to decide political disputes, as the objection that a dispute is political is in itself more political than legal.

If the political character of a contention that a dispute is political is admitted, the next step in the evolution of the law of pacific settlement would be to confer power upon a political body to deal with that dispute. The unratified arbitration treaties concluded by the United States with France and Great Britain in 1911 provided that a dispute as to whether a difference is justiciable should be submitted to a joint commission of inquiry composed of six members, each party designating three thereof, and, further,

[4] H. Kelsen, Law and Peace in International Relations, Cambridge, Mass., 1942, pp. 159–168; same author, Compulsory Adjudication of International Disputes, this JOURNAL, Vol. 37 (1943), pp. 397–406.

[5] But see H. Lauterpacht, The Function of Law in the International Community, London, 1933, pp. 187–189, 205–206.

that if all but one of the members of the commission agree that such difference is within the scope of the jurisdictional clause, it shall be referred to arbitration. When the League of Nations was established the power to give the political decision whether a dispute be legal or political could have been conferred upon the Council of the League. But the provisions endowing the Council to decide such a question are rare, as the parties prefer to leave that question open. As an exception, the arbitration treaty of March 21, 1928, between Greece and Romania states explicitly that "if there is a difference of opinion whether a dispute is of a purely legal nature, the question shall be submitted, at the request of one or other of the Parties, to the Council of the League of Nations for consideration in virtue of Article 11, paragraph 2, of the Covenant of the League of Nations," and the parties undertook "to comply with the unanimous recommendation of the Council." [6]

When the Protocol for the Pacific Settlement of Disputes was considered by the Assembly of the League of Nations in 1924 the joint report of the First and Third Committee of the Assembly admitted that a State might, when accepting the obligatory jurisdiction of the Permanent Court of International Justice, "reserve the right of laying disputes before the Council of the League with a view to conciliation in accordance with paragraphs 1–3 of Article 15 of the Covenant, with the proviso that neither party might, during the proceedings before the Council, take proceedings against the other in the Court." [7] Such a reservation was made by France in her abortive declaration of 1924.[8]

In signing the Optional Clause in 1929 the British Government reserved the right

> to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that such suspension shall be limited to a period of twelve months or such longer period as may be agreed by the parties to the dispute or determined by a decision of all the Members of the Council other than the parties to the dispute.[9]

At the time of making this reservation, the British Government explained that it is meant

> to cover disputes which are really political in character though juridical in appearance. Disputes of that kind can be dealt with more satis-

[6] Article 5. 108 League of Nations Treaty Series, p. 191.

[7] Records of the Fifth Assembly (1924), Plenary, p. 484.

[8] 27 League of Nations Treaty Series, p. 419.

[9] Hudson, work cited, pp. 689–690. A similar reservation was made by Great Britain when acceding to the Geneva General Act of 1928: 107 League of Nations Treaty Series, pp. 529–531.

> factorily by the Council, so that the conciliatory powers of that body may be exercised with a view to arriving at a friendly settlement of the dispute. This formula places the United Kingdom in much the same position as a State which has agreed to a treaty of arbitration and conciliation providing for the reference of all disputes to a conciliation commission before they are submitted to judicial settlement. The formula is wide in character because the extent to which it operates depends on the Council itself. It would cease to operate from the moment when the Council decided that it was better that the question should be submitted to the court, and therefore declined to keep the dispute under consideration. Within these limits, however, the proviso would apply to any justiciable dispute, whatever its origin.[10]

Identical reservations were made by Australia, Canada, India, New Zealand, and South Africa;[11] Czechoslovakia reserved "the right, for either of the parties to the dispute, to submit the dispute, before any recourse to the Court, to the Council of the League";[12] Iran reserved "the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to the Council of the League";[13] Iraq reserved the right to require such suspension "in respect of any dispute which has been submitted to and is under consideration by the Council or Assembly of the League";[14] Rumania reserved the right "to submit the dispute to the Council before having recourse to the Court."[15] Slightly different in character are the reservations made by France, Italy, and Peru. France, in its 1929 declaration which replaced the declaration of 1924, limited her acceptance to disputes "which could not have been settled by a procedure of conciliation or by the Council, according to the terms of Article 15, paragraph 6, of the Covenant";[16] i.e., by a report of the Council "unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute." Italy recognized the Court's compulsory jurisdiction "in any case where a solution through the diplomatic channel or further by the action of the Council of the League of Nations could not be reached."[17] Peru excepted from the jurisdiction of the Court

[10] Great Britain, Parliamentary Papers, Misc. No. 12 (1929), Cmd. 3452, pp. 6–7.

[11] Hudson, pp. 683, 685, 691–2, 695–6, 699–700. Similar reservations were made by Australia, Canada, India and New Zealand when acceding to the Geneva General Act: 107 League of Nations Treaty Series, pp. 531–536.

[12] Hudson, p. 686. [13] Same, pp. 692–3. [14] Same, p. 693. [15] Same, p. 698.

[16] Same, p. 688. In accepting the Geneva General Act, France made a more precise reservation providing that "disputes which the parties or one of them may have referred to the Council of the League of Nations will not be submitted to the procedures described in this Act unless the Council has been unable to pronounce a decision under the conditions laid down in Article 15, paragraph 6, of the Covenant": 107 League of Nations Treaty Series, p. 529.

[17] Hudson, p. 694. Similarly, Italy's reservation made in accepting the General Act of Geneva excepts "disputes which may be submitted to the Council of the League of Nations in virtue of one of the provisions in the Covenant": 111 League of Nations Treaty Series, p. 415.

cases where the parties have agreed "to submit the dispute previously to the Council of the League of Nations." [18]

The common thought underlying all these reservations is the wish to withdraw from the Court all disputes in which settlement by the Council appears more desirable. While Peru makes the reference to the Council depend upon the agreement of the parties to the dispute, all other declarations leave the decision in the hands of one party, the defendant in the case. But, as has been rightly pointed out in the British statement quoted, the exclusion operates only as long as the Council deems it proper to retain the case under consideration. If the Council decides that the case should be submitted to the Court, it can open the way by the simple device of refusing to take further cognizance of the matter. After such a decision of the Council either party to the dispute would be at liberty to submit the case to the Court and the other party would not be able to rely any longer upon its right to refer the dispute to the Council on the ground of non-justiciability. Once both the parties are back in the Court it would still be possible for either of them to claim that the dispute was not legal and the Court would then have to decide on this jurisdictional issue. If it should find that the objecting party had raised objections of a non-legal character it would have to dismiss the case. Thus if a party were persistent in its claims it could first start a tennis game between the Court and the Council and then run away with the prize by getting a rejection of the case both from the Council and from the Court. A very unwholesome situation!

The lesson to be drawn from this historical analysis seems to be that, whatever the formula, the states of the world are going to evade the Court's jurisdiction whenever they deem it unsuited for the decision of their disputes with other states. No definition of legal disputes can be made so narrow as to prevent the adjudication of disputes involving to some extent non-legal issues, and the states will always reserve the right to claim that a particular dispute cannot be satisfactorily adjudicated by a court, even the ideal court. If that right can otherwise be preserved, the states might be willing to abandon the insistence upon the meaningless limitation of the adjudication process to some carefully defined categories of "legal" disputes. Thus the gate might be opened wide for a jurisdictional clause allowing the adjudication according to law of all inter-state disputes, provided a procedure is devised allowing a state to take a case before a political body whenever it deems that the latter's decision would take better care of the particular issue involved.

It would detract from the authority of the Court if cases were taken from it to the Council, one after another. The vice of the British formula is that the case is withdrawn from the Court after it has already been submitted. It would be less damaging to the authority of the Court if the re-routing of

[18] Hudson, p. 697. This reservation was not repeated by Peru in her instrument of accession to the Geneva General Act.

the case were accomplished during the stage of diplomatic negotiations preceding the submission of the case to international settlement. A proviso might be inserted into the jurisdictional clause to the effect that no case can be submitted to the Court without previously communicating the contents of the application to the respondent party. If the latter replies within two months [19] that the case should be rather submitted to the Council, the plaintiff should be precluded from bringing the case to the Court and the case should be brought before the Council instead.

Once the Council has taken cognizance of the case it might find it desirable that certain legal issues between the parties should be decided authoritatively by the Court. It might ask the Court for an advisory opinion on the matter, or it might prefer to request the parties to submit the case to the Court by special agreement. If no such agreement can be reached the Council may request one of the parties to submit certain specified questions to the Court by application. To avoid obstruction by the other party it may be necessary to provide that, in cases brought before the Court by application based on request by the Council, the respondent party should not be allowed to raise any jurisdictional objections, except with respect to the question whether the application is within the limits specified by the Council.

A provision based on the principles outlined would create obligatory jurisdiction of the Court for particular cases on the sole condition that a claim of a party to have the issue decided by the Court has been endorsed by the Council. While it is just a dream to try to impose obligatory jurisdiction of the Court with respect to classes of disputes determined in advance and without an escape clause for borderline cases, it might be possible to provide it for cases in which the Council, taking into account all the circumstances of the particular case, deems it desirable that the Court be seized of the case and is willing to declare in advance that it will back up any decision that Court may render. If the general climate of international relations is favorable and the world's opinion is on its side the Council might accomplish a great deal by means of this device.

Any possibilities of an abuse of these powers could be easily checked by requiring a large majority in the Council,—two-thirds or three-fourths,—for any decision on the subject. Or the British formula may be adopted and the decision upon a request may be made dependent upon an agreement between "all the Members of the Council other than the parties to the dispute."

In lieu of conclusions, the following tentative formula of a provision for pacific settlement of international disputes is suggested for inclusion in the basic instrument of the general international organization envisaged in the Moscow Declaration of October 30, 1943:

[19] This time-limit may be too long; the declarations of the members of the British Commonwealth did not hesitate to require the submission of the dispute to the Council within ten days after notification.

1. (a) Any dispute between two or more states may be submitted to the Permanent Court of International Justice by an agreement between the parties to the dispute.

   (b) If the parties fail to reach an agreement upon the terms of the submission, either party shall be at liberty, after giving two months notice, to bring the dispute before the Court directly by an application.

   (c) Within the two months following the receipt of the notice any party to the dispute which objects to the submission of the dispute to the Court may request the Council to take cognizance of the case.

   (d) If such request is made, the dispute cannot be submitted to the Court by application except upon special authorization by the Council.

2. (a) The Council may, by simple majority vote, take cognizance of any dispute between two or more states, either upon its own initiative or at the request of any state whether party to the dispute or not.

   (b) In dealing with a dispute the Council may, by simple majority vote, request the Permanent Court of International Justice to give an advisory opinion on any legal question connected therewith, or it may, by two-thirds vote [by a vote of all the members of the Council other than the parties to the dispute?], authorize the parties to submit specified legal questions to the Court for decision.

   (c) If a special agreement between the parties has not been reached within fourteen days after the request was made by the Council, either party to the dispute shall be authorized to submit the questions specified by the Council to the Court directly by an application.

3. The Court shall be competent to decide any question as to its jurisdiction, and in particular whether the application is within the limits specified by the Council. Its decision of any such question and its judgment on the merits shall be binding upon the parties to the dispute.

4. (a) If the dispute as a whole is not settled by the decision of the Court or if the dispute has not been referred to the Court, the Council shall endeavor to bring about a settlement of the dispute by an agreement of the parties.

   (b) If its effort to bring about such settlement is not successful, the Council shall have power, by two-thirds vote [by a vote of all members of the Council other than the parties to the dispute?], to give a decision binding on the parties to the dispute.

5. In the event of a failure by a party to the dispute to comply with a decision of the Court or of the Council, the Council may, by two-thirds vote [by a vote of all members of the Council other than the parties to the dispute?], take such action as it may deem to be necessary for giving effect to the decision.

LOUIS B. SOHN

THE LEGAL ASPECTS OF SOVEREIGNTY OVER THE DODECANESE

The coming months are sure to see world attention focussed upon the Eastern Mediterranean. The strategic importance of the strong Italian naval bases in the Dodecanese Islands is attested by the vigor with which Germany fought to regain them,—at no inconsiderable sacrifice,—after the Italian armistice last September and the occupation by the United Nations of Leros, Cos, and other islands. An Allied blow in this theatre of war is imminent. Subsequently the question of the rightful ownership of the Islands, which has remained a source of disturbance for thirty-two years as a result of the vacillations of international diplomacy, will have to be finally settled. An examination of the legal aspects of the matter is therefore most timely.

During the Italo-Turkish war of 1911–1912 Italy occupied the Dodecanese Islands "temporarily" and for "purely military purposes."[1] This was simply a *de facto* possession. At first the inhabitants welcomed the Italians as liberators. On June 17, 1912, approximately one month after the coming of the Italian officials, a Congress held on the Island of Patmos, and consisting of delegates from all the Islands, declared "the permanent desire of the Aegean people to be united with their mother country, Greece." Now the real intentions of the Italian authorities began to become manifest. No recognition was given to this declaration, and severe penalties were imposed upon some of the delegates. On October 15, 1912, at the conclusion of the Italo-Turkish war, the peace treaty signed at Ouchy (Lausanne) between the two countries stipulated that Italy would undertake to withdraw "from the islands that it occupies in the Aegean Sea." Upon various pretexts, however, Italian authorities continued the occupation of the Islands until the outbreak of World War I.

In 1915 the Allies, in order to persuade Italy to enter the war on their side, offered her "full possession" of all the Twelve Islands, confirming this transaction in the secret Treaty of London (Article VIII).[2] In 1917, however, the United States, joining forces with the Allies, insisted that secret treaties should not be recognized. Italy herself cast doubts upon the Treaty of London at the Peace Conference by asking for Fiume,[3] which had by the same instrument been promised to Croatia.[4]

[1] Declaration of the Italian Prime Minister Giolitti before the Italian Parliament: *Corriere della Sera*, Dec. 5, 1912.

[2] Quoted in René Albrecht-Carrié, Italy at the Peace Conference, New York, 1937, pp. 334–339.

[3] There is no room for doubt as to the stand taken by President Wilson on either the Dodecanese question or the issue of secret treaties. When Fiume was under discussion the position of the United States President was that "the only advantage in letting the Italians have Fiume would be that it would break the Treaty of London which he was disturbed to find allotted the Dodecanese to Italy": David Hunter Miller, My Diary at the Paris Conference, New York, 1923, Vol. XIX, p. 570. This evoked bitter opposition from Italian quarters at the Peace Conference. Signor Sonnino declared, "Italy had made definite agree-

On July 29, 1919, under pressure from the Allied Powers, the Italian Foreign Minister, Tittoni, reached an agreement with Venizelos, the Greek Premier, and the two signed an accord approved by the Supreme Council [5] whereby Italy promised to hand over the Dodecanese to Greece, with the exception of Rhodes. The last was to remain under Italian sovereignty, but to enjoy "broad local autonomy." [6] The final decision in the case of Rhodes was left to a plebiscite which was to be held within five years. [7]

Provisions based on the Tittoni-Venizelos accord were included in the draft of the Treaty of Sèvres, between the Allies and Turkey. Article 122 of this treaty provided that Turkey "renounces in favor of Italy all rights and titles on the islands of the Aegean." The intention of the Allies in introducing this article was to transfer the title to Italy in order to legalize the transfer from Italy to Greece in accordance with the Italo-Greek accord described above.

Confirming this position, the United States Senate unanimously adopted a resolution supporting the union of the Dodecanese with Greece.[8]

Difficulties in execution of the transfer began with the repudiation by Count Sforza of the Tittoni-Venizelos agreement. On July 22, 1920, after Sforza had become Foreign Minister of Italy, he sent a note to the Greek Government denouncing the accord. In consequence of this action, on the eve of the convention of the signatories, the Greek Government refused to sign the Treaty of Sèvres. Following protests by Great Britain, Italy alleged that the Tittoni-Venizelos accord had no relation to the Treaty of Sèvres. British representatives strongly opposed this subterfuge, however, and induced Italy to enter upon new negotiations with the Greek delegation, with the result that a new agreement was signed by both parties on August 10, 1920, at Sèvres, in the presence and with the full cognizance of the Allies and the Central Powers. Article I thereof specified: "Italy renounces in favor of Greece all rights and titles to the Islands of the Aegean Sea occupied by her." Article II provided that "broad local autonomy" was to be accorded to the Island of Rhodes until such time as a plebiscite should be conducted there.[9] The Allies then signed the Treaty of Peace with Turkey, called the Treaty of Sèvres, and containing the article indicated above

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ments with the Allies. Now comes a third party who says we must give up all this and that because of new principles which Wilson believes in but I do not": Luigi Aldrovandi Marescotti, *Guerra Diplomatica*, Milano, 1937, p. 250.

[4] Article V (Note), Albrecht-Carrié, work cited, p. 336.

[5] Minutes of the Council of Heads of Delegation July 18.

[6] A. Tsacalakis, *Le Dodécanèse*, Alexandria, 1928, pp. 66–72.

[7] Quoted in M. A. Frangulis, *Dictionnaire Diplomatique*, Paris, 1933, Vol. I, p. 739.

[8] Congressional Record, Vol. 59, Part VII, p. 7160 (May 17, 1920).

[9] A similar provision was made by a special note, signed the same day, for the Island of Castellorizo: S. Zervos, *La Question du Dodécanèse et ses Documents Diplomatiques*, Athens, 1926, p. 119. See also N. G. Mavris, Sforza vs. Sforza, New York, 1943, p. 11.

providing for the transfer of claims upon the Aegean Islands from Turkey to Italy in order that the Greco-Italian agreement might be valid.[10]

There is good evidence that Italy actually undertook to fulfill her promises. She acknowledged the new legal status of the Islands by appointing a civil governor of "Rhodes and Castellorizo" to succeed the military governor.[11] This new appointee, Signor Maissa, issued a proclamation on October 8, 1920, informing the people that a "new regime of broad autonomy" was established. Passports issued to Dodecanesians were designated as invalid "after the cession of the Islands to Greece." Specimens of these passports are extant.[12] In spite of these indications of good faith the Greco-Italian agreement of August 10, 1920, was never ratified by the Italian Government.

Greece meanwhile became involved once more in conflict with Turkey. On October 8, 1922, immediately upon the defeat of the Greek troops in Asia Minor, Italy denounced the Greco-Italian agreement of Sèvres, on the ground that it was interrelated with two other treaties which had become invalid and that validity could therefore not be claimed for the third. (The other two were the Peace Treaty of Sèvres, and the Tripartite Treaty.) Greece protested against this allegation, pointing out that the Tripartite Treaty had nothing to do with her,[13] inasmuch as she had not been a party thereto. Likewise Great Britain immediately (Oct. 14, 1920) protested, at that time taking the stand that "The question of the Dodecanese concerned the Allies as a whole and not Italy and Greece exclusively and that this contention had been admitted by Italy herself." [14] Therefore unilateral repudiation by a single signatory of any part of the previous agreement was inadmissable.

In January, 1923, the draft of the Peace Treaty of Lausanne, which superseded the Treaty of Sèvres, was submitted to the various delegates. It contained two articles (15 and 16) relating to the Dodecanese, the first being identical with Article 122 of the Treaty of Sèvres and the second stating that "the fate of the Islands is settled or to be settled by the parties interested". In regard to these two articles the Greek Delegation submitted the following memorandum on January 29, 1923:

> The Hellenic Delegation has no objection to make against Article 15 of the draft Treaty, in virtue of which Turkey engages to renounce, in favour of Italy, all her rights and titles in the Dodecanesian islands enumerated in that Article. It considers the procedure followed as just. It would recall, however, that an unratified treaty exists between Italy

[10] Same, p. 99.

[11] G. Mondaini, *Manuale di Storia e Legislazione Coloniale*, Rome, 1924, Part II, pp. 214–215.

[12] A reproduction of such a passport is to be found on page 32 of The Dodecanesians Are Not Enemy Aliens, New York, 1942 (published by the Dodecanesian League of America).

[13] A. J. Toynbee, Survey of International Affairs, 1924, London, 1926, pp. 470–1.

[14] H. W. V. Temperley, A History of the Peace Conference of Paris, London, 1920–1924, Vol. VI, p. 37.

> and Greece on the question of the definite attribution of these islands and it reserves the right of the Greek Government, as soon as Turkey has relinquished her rights on these islands, to engage in amicable conversations nécessary for the determination of their future lot. The Hellenic Government, making this reserve, counts on the spirit of justice and equity of all, and above all of the Italian Government, to give the question of the islands a solution conformable to the principles of nationalities and to the *accords already existing*.[15]

The Treaty of Lausanne was signed six months later, on July 24, 1923, without any comment or objection from the Italian Delegation concerning the above reservation.

The clause "is settled or to be settled," in Article 16, admits of only one interpretation. The patent meaning is that either a new agreement would be concluded, as requested by the Greek Delegation in their note, and the issue was thus "to be settled"; or, if no new agreement were made, the Treaty of August 10, 1920, would remain in effect. An alternative interpretation can be based only upon the unilateral denunciation by Italy of the Greco-Italian agreement of Sèvres. The denunciation cannot be upheld, as already indicated, and elaborated below.

Certain Italian authors maintain that by the Treaty of Lausanne Italy acquired full sovereign rights over the Dodecanese, basing their claim upon Article 15, in which the title is transferred from Turkey to Italy. They make no reference to Article 16, however, which provides for the settlement between Italy and Greece.

No new agreement between the two countries has been made, and no negotiations or "amicable conversations" on the subject of the Dodecanese undertaken. The Greek Government has taken occasion several times, the latest in 1939 [16] to remind Italy of her obligations, but no final settlement has been achieved, and the other signatories of the Treaty of Lausanne have been unwilling to intervene because intervention would mean risking international involvement.

From the point of view of international law it is extremely important to note the support by the Great Powers of the Greek claims in regard to all the agreements concerning the Dodecanese. The interallied character of these agreements has been repeatedly emphasized. For instance, Lloyd George refused on behalf of the British delegation to sign the Treaty of Sèvres until the Greco-Italian agreement of August 10, 1920, had been concluded. Prime Minister MacDonald, speaking in the House of Commons on February 25, 1924, brought this issue to the fore again. The subject of discussion was Jubaland but the Prime Minister took occasion to stress the relation of his arguments to the Dodecanese question also. He said:

[15] Quoted in C. D. and Isabelle B. Booth, Italy's Aegean Possessions, London, 1928, p. 310 (our italics).

[16] Greek White Book, 1940, American Edition, Document No. 45, pp. 35–37.

> I find that in concluding with the Italian Government the agreement of April, 1920, regarding Jubaland, Lord Milner made a written reservation in the sense that this agreement could only become effective as part of the general settlement of *all the issues raised* at the Peace Conference. These issues, as the Italian Government have *often* been reminded, embrace the question of the Dodecanese, *and the Italian Government have for their part recognized that the Treaty which they concluded with Greece on August 10, 1920 was the result of agreement between the Allies, and that the settlement of the Dodecanese Question is not only the concern of Italy and Greece.*
>
> The honorable and gallant member must remember that the inhabitants of these islands ethnologically belong to Greece; and that *their continued severance from that country is hardly conducive to that general tranquillity which H. M. Government have so much at heart.*" [17]

This declaration was made by the British Prime Minister eight months after the Treaty of Lausanne, and one month after Italy's ratification of this Treaty. No objection was raised by the Italian government to MacDonald's assertion regarding their position. This, then, furnishes a tacit admission on Italy's part that she herself conceded the interallied character of the Greco-Italian Agreement of August 10, 1920. Her attempt in October 1922, to repudiate this agreement unilaterally had therefore failed.

Italy's claim to the Dodecanese, then, rests upon a misconstruction of the clause in the Treaty of Lausanne transferring the title to her from Turkey. It was clearly understood, however, and was recalled by the Greek Delegation in Lausanne, that the relevant clause was introduced for the sole purpose of legalizing the transfer from Italy to Greece. This had been guaranteed in the Greco-Italian agreement of Sèvres and was virtually reasserted by Article 16 of the Treaty of Lausanne. The situation of course parallels that of the Treaty of Sèvres, which this superseded. The documents arranging the transfer therefore have every claim to interallied support. If any doubt has existed as to the significance of these measures for the peace of Europe, such doubt has been tragically dispelled by events of the present War.

If one were not aware of recent developments he might ask why Italy has so stubbornly attempted to maintain a claim to the Dodecanese. A glance at the map furnishes the answer. The Islands lie at the gateway to the East, constituting a key to a land route through Asia Minor and to the sea routes north through the Dardanelles and south through the Suez Canal. As naval and air bases they have made it possible for Italy, and up to the present moment for Germany, to dispatch deadly weapons of destruction from the Eastern Mediterranean.

The toll in human suffering which has been exacted by this means since the beginning of the second World War may be compared with that of the

[17] Great Britain, Parliamentary Debates, N.S., House of Commons, Vol. 170, (Feb. 25, 1924) (our italics).

inhabitants of the Islands ever since 1912, when this first manifestation of the imperialist policy of the Italian Government appeared and went unchecked by the Great Powers.

Why, then, has no international intervention during these thirty-two years forced Italy to withdraw her occupation? Why have the Allies never finally carried out the intention of their treaties and resolutions? This question is to be answered as all those concerning appeasement measures which occured prior to the present War. It is not our purpose here to sit in judgment upon moral issues. Italy's final surrender of the Dodecanese Islands has taken place, in the armistice of September 8, 1943. It will therefore rest in Allied hands to carry out the agreements made concerning the Aegean Islands, as soon as Nazi occupation can be terminated.

JOSEPH S. ROUCEK

POST-WAR INTERNATIONAL JUDICIAL ORGANIZATION

The advocates of an international police force to maintain order, as well as those who simply favor a durable peace, tend to overlook or minimize an essential element for the maintenance of order in any community. As pointed out by Pascal some three centuries ago, "Power without justice is tyranny. Justice without power is meaningless, for the wicked will always contest it. We must, then, reconcile justice with power, so that that which is just shall be strong and that which is strong shall be just."

While international controversies may not be prevented from arising, they may be solved justly by prompt resort to international tribunals. Prior to 1939 competent and accessible international courts were conspicuous by their absence. The only permanent court, the World Court, handed down in the eighteen years during which it functioned only thirty-two judgments and twenty-six advisory opinions, or less than one-tenth of one per cent of the fifty thousand cases decided by temporary international tribunals. The shortcomings of such temporary courts were characterized by Charles Evans Hughes, while Secretary of State, as follows:

> "Arbitrators are selected to determine a particular controversy, and after the controversy has arisen. When the decision has been made the arbitral tribunal ceases to exist. There is unnecessary expense in the creation of a separate tribunal for every case and there is a regrettable loss in the experience of judges because of the lack of continuity in service. For the same reason the development of the law suffers, as, instead of a series of decisions with appropriate relation to each other by a permanent bench of judges, thus gradually establishing a body of law, there are sporadic utterances by temporary bodies disconnected with each other, acting under different conditions, and having a widely different capacity."[1]

It is accordingly encouraging to note that a Coördinating Committee of the Section of International and Comparative Law of the American Bar Associa-

[1] American Society of International Law, Proceedings, 1923, p. 77.

tion, consisting of Willard B. Cowles, Edwin D. Dickinson, Amos J. Peaslee, Edgar Turlington and the writer as Chairman, has, with the advice of leaders of the international bar, prepared a comprehensive report on Post-War International Judicial Organization and secured action in accord therewith. After protracted and thorough debate the Section of International and Comparative Law and the House of Delegates of the American Bar Association acted favorably on this report by adopting, on September 13, 1944, at the Sixty-seventh Annual Meeting, in Chicago, of the American Bar Association, the following resolutions:

> WHEREAS, the effective administration of international justice is an indispensable element in the maintenance of peace; and
>
> WHEREAS, there have not been readily accessible permanent international courts for the adjudication of all justiciable disputes among nations; and
>
> WHEREAS, the history of the development of judicial tribunals in various nations demonstrates the advantage of circuit courts and the service by members of the highest tribunals on circuit courts:
>
> Now therefore be it RESOLVED:
>
> I. That the Permanent Court of International Justice, organized in 1922 at The Hague and known as the World Court, should be continued as the highest tribunal of an accessible system of interrelated permanent international courts with obligatory jurisdiction.
>
> II. That the World Court be so organized that a member shall be available to sit as an International Circuit Court, with original jurisdiction, to hold regular terms in the Capital of each member nation of the International Judicial System. In addition to the World Court Justice on Circuit, each such Circuit Court shall include one or more International Commissioners assigned to sit in an advisory capacity.
>
> III. That an International Judicial Conference composed of jurists should be convened at the earliest practicable moment with a view to concluding an "International Judiciary Agreement" based on the Statute of the World Court, with such amendments as may be necessary to give effect to the foregoing resolutions and to provide for the prompt organization and maintenance of the "International Judicial System."

These simple proposals, endorsed by the duly elected representatives of some 110,000 lawyers in the United States, do not suggest any change in the political organization of the international community. They are adaptable to many conceivable changes. They would provide a conservative, tried, and orderly procedure for the judicial settlement of international controversies of the types that have been presented to improvised temporary tribunals for many decades. They envisage some sixty regularly available International Circuit Courts of original jurisdiction in addition to the World Court.*

JAMES OLIVER MURDOCK

* A fuller discussion of the resolutions briefly cited here, together with the committee report on which they were based, is in preparation. In the meantime the writer would greatly appreciate receiving comments or constructive suggestions; he may be addressed at 1824 Twenty-third Street, Washington 8, D. C.

THE INTERIM COMMISSION ON FOOD AND AGRICULTURE AND THE FAO

The United Nations Interim Commission on Food and Agriculture, authorized at the Hot Springs conference in May, 1943,[1] and set up in July of that year,[2] has received less attention than some other international administrative agencies authorized or created in the past two or three years, and less than it deserves. That is undoubtedly traceable in part to the fact that the Commission has been—indeed, still is—a temporary agency, designed to pave the way for a permanent organization in the same field; only on August 1 was the draft constitution for the permanent Food and Agriculture Organization of the United Nations (FAO) published.[3] It is traceable also in part to the incurable taste of even serious students of international relations for seemingly more sensational or pathetic subjects such as war, finance, and refugees. In any case the existing organization deserves certain comment at this stage and the projected organization deserves to be watched as it comes into being in the (probably) not very distant future.

The Interim Commission has consisted [4] of representatives of some forty-five governments, which had taken part in the Hot Springs meeting; it has a Canadian Chairman and Russian and Chinese Vice-Chairmen. No name has been adopted by the union of states and self-governing dependencies supporting the Commission, all members of the United Nations group or associated therewith,[5] and scattered all over the world. No organ of the union is created to supervise the work of the Commission. The Commission has had its headquarters in Washington. It has had the benefit of assistance from two panels of experts of ten or twelve each—one Economic, one Scientific—drawn from various countries.[6] Finally it has created four Committees, an Executive Committee of eleven and three working committees—"A", "B", and "C"—which have dealt, respectively, in accordance with resolutions adopted at Hot Springs, with the obligations of governments toward one another and toward their own peoples in matters of nutrition and standards of living, plans for the permanent organization, and projects and current activities of the Commission.[7] There is an international secretariat of some 35 persons, under the direction of a (United States) Executive Secretary.[8] Contacts have been established with various war and relief agencies, —particularly UNRRA,—and with experts in various countries and various international organizations, especially the League of Nations and Interna-

[1] United Nations Conference on Food and Agriculture, Hot Springs, Va., May 18–June 3, 1943, Final Act and Section Reports; Washington, 1943, p. 12; this JOURNAL, Vol. 37 (1943), Supplement, p. 159.

[2] First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture, Washington, 1944, p. 7.

[3] First Report, p. 41. [4] Same, p. 52. [5] Same, pp. 52–55. [6] Same, pp. 7, 8.

[7] Interim Commission, Information Document 18, p. 2. Some five advisory groups have functioned under Committee C, all coördinated by a Reviewing Committee.

[8] Same, pp. 1, 2.

tional Labor Organization.[9] In general the work of the Commission has been to carry out the recommendations of the 1943 conference, particularly by laying plans for the permanent organization, by working out the content of the obligations of members mentioned above as well as their obligations for improved production and distribution of food (individually and in coöperation), and by initiating the research and promotional activities which will form such a large part of the work of the permanent organization. The expenses have been met by contributions from the participating states on a scale calculated according to ability to pay; the expenditure of the organization amounted to about $175,000 durings its first year. The Commission has sought to plan and to pave the way for an international organization which will do for the producer and the consumer of food something like what the ILO tries to do for labor and industry.

The proposed Organization is envisaged as the first of a series of post-war functional international agencies, this one aimed at expanding the "economy of abundance" in its member states. The permanent[10] organization will come into existence when twenty nations have signed the Constitution;[11] the Interim Commission will dissolve with the opening of the first session of the Conference of the new organization and all its records and property pass to the latter.[12]

The objectives to be served by FAO are to be those served by the Interim Commission, with slightly greater emphasis upon promotion of general international economic prosperity.[13] Preservation of peace is to be served by combatting hunger and disease, and human welfare in these fields is also to be served for its own sake.[14] Food and agriculture remain the subject matters to be dealt with in general, although there now appears an expanded reference to nutrition in that connection. Fisheries are now included in the category of food products, and forestry and forest products (fibres and oils, but not rubber)—now growing so rapidly in international importance—are included in the non-food agricultural products with which FAO is to deal.[15] Public education and administration relating to food and agriculture are included as are the processing and distribution of foodstuffs, and also agricultural credit.[16]

The methods or forms of procedure to be employed include research (the collection of information and its analysis), education (interpretation and dissemination of information), and promotion (advice and recommendations). Provision of assistance to governments (missions, *e.g.*) and "all necessary and appropriate action to implement the purposes of the Organization" are

[9] Same, p. 2; First Report, p. 8; Interim Commission, Inf. Doc. 10, p. 3 and Inf. Doc. 19, p. 5.

[10] Great emphasis is placed on this element in the situation, in contrast to UNRRA; Inf. Doc. 19, p. 1. [11] Proposed Constitution, Art. XXI, par. 3. [12] Art. XXVI.

[13] Compare the First Report, pp. 5–6, with the Preamble to the proposed Constitution.

[14] Inf. Doc. 19, p. 5.

[15] Proposed Constitution, Art. XVI; First Report, pp. 21–22. [16] Art. I.

authorized.[17] The FAO as planned remains an advisory organization without clear powers of legislation, decision, or enforcement, but every effort is made to strengthen the influence of advice and recommendation in its operation. The FAO is to be integrated with any post-war general international organization and develop "close" relations with other international bodies in related fields.[18] It is to be managed by a general conference meeting at least once annually and organized on the principle of equality.[19] An Executive Committee of 9–15 members is provided, whose members are to act for the organization and "not as representatives of their respective governments." [20] Standing advisory committees in various fields are to be created; such committees are envisaged on both regional and subject-matter bases. There is to be a Director-General and an international staff selected on the basis of technical competence.[21]

An interesting paragraph makes provision for contact with the public through conferences to be attended by representatives of international and national bodies, official or unofficial (scientists, consumers, farmers).[22] It is felt that the work of FAO, dealing with "the daily needs of the common man," can bring international coöperation home to people as has never before been done.[23]

A budget for the organization of $5,000,000 per year for the first five years is proposed, but only one half of the normal sum is to be available during the first year.[24] The reason given for "so modest an estimate" is that FAO is to operate largely through action by member nations, and by use of personnel provided by them. The expenses are to be defrayed by contributions from participating states according to their ability to pay (as defined by the Conference); [25] the United States will pay 25%, Great Britain 15%, Russia 8%, and China 6½% of the first year's expenses.[26]

A few special features of the organization and program set forth for F.A.O. may be noted. Thus new members may be added by a two-thirds vote of the Conference, no state or other entity being excluded in advance by reason of political creed or diplomatic status.[27] The Conference in other matters is to act by simple majority except where specially restricted (recommendations to governments for national action require two-thirds approval, *e.g.*, as do proposals for conventions among members, and Constitutional amendments); [28] there is no explicit provision for unanimity in the Constitution [29] although there is likewise no express grant of general legislative power on the subject matters to be treated by the Conference. Supervision over the permanent staff, under the Director-General, is in the hands of the Conference and Executive Committee, but the Director-General is expressly re-

[17] Art. I. [18] Arts. XII–XIV. [19] Arts. III, IV. [20] Arts. V, VI. [21] Arts. VII, VIII.
[22] Art. VI, par. 2. [23] Inf. Doc. 19, p. 6. [24] Same, p. 4. [25] Constitution, Art. XVIII.
[26] Inf. Doc. 19, p. 4. It is expected that these quotas will be substantially reduced after the first year. [27] Art. II. [28] Art. III, par. 8; Arts. II, IV, VII, XIII, XX.
[29] But see the complicated par. 1 of Art. XX.

quired to formulate proposals for their consideration.[30] The Staff is precluded from taking orders from any source outside of the organization and the member nations agree to respect this principle.[31] Slightly restricted diplomatic privileges and immunities are to be extended by member states to the staff and full privileges to organization property, including immunity from suit and taxation.[32] The seat of FAO is to be decided by the Conference and regional offices may be established by the Director-General with its approval; Washington is to be the temporary seat of the FAO "unless the Conference should otherwise determine."[33] Rather exacting provisions for reports by member states are set out, and strong stipulations for coöperation with other public international organizations, including arrangements for common personnel policies and interchange.[34] Provision is made for interpretation of the Constitution by "an appropriate international court or arbitral tribunal."[35] Withdrawal after four years' membership is permitted, upon one year's notice.[36] English is to be the language of the Conference pending adoption of any other rules on the subject.[37]

On the whole the project marks a great improvement over most examples of international organization and administration in the past. There are numerous indications that the well-arranged Constitution was drafted by or in consultation with certain individuals who have had personal experience in international administration and who have thought deeply on its problems.[38] The legal aspects of the situation seem likewise exceptionally well handled. The result is seen in very radical improvements at certain points (relations with other organizations, personnel, etc.). At other points conservative or reactionary influences are detectable (withdrawal, amendments). The dosage of evangelical and even mystical enthusiasm seems a little heavy in spots, giving rise to some fears that the promoters of the new organization may be exaggerating the ease with which such a program,—touching, as it does, in spite of its supposed technical and purely social or humanitarian character, on some of the most tenaciously cherished items of national policy and independence,—may be realized. It remains to be seen whether the new organization will actually be set up as projected and if so how well it works.

P. B. P.

A DESIGN FOR A CHARTER OF THE GENERAL INTERNATIONAL ORGANIZATION

In the Moscow Declaration of October 30, 1943, the Governments of the United States of America, the United Kingdom, the Soviet Union, and China recognized "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and

[30] Art. VII. [31] Art. VIII, par. 2. [32] Art. VIII, par. 4; Art. XV, par. 2.
[33] Arts. IX, X, XXIV. [34] Arts. XI, XII. [35] Art. XVII.
[36] Art. XIX. [37] Art XXIII. [38] See First Report, p. 8, par. 5

security." In a resolution of November 5, 1943, the Senate of the United States recognized the necessity of a general international organization in identical terms.

The lines to be followed in building such a general international organization have therefore become a matter of immediate interest to the people of this and other countries.

Acting solely in their private capacities, a group of Americans who have had experience in the work of international organizations have endeavored to block out the lines which in their judgment might best ensure the efficacy of a general international organization. In a series of fifteen conferences held over a period of several months, they have sought to draw upon the experience of the past as well as upon the numerous suggestions which are current; they have been aided especially by the statement on "The International Law of the Future" recently issued by two hundred Americans and Canadians actively interested in international law. The result is the Design for a Charter which is offered to JOURNAL readers herewith.* It is intended to serve not as a draft of an instrument, but as an indication of the outstanding problems which present themselves and of possible and desirable ways of dealing with them.

The phrase "General International Organization" has been taken from the Moscow Declaration and the Senate resolution. It is employed not as a name but as a term of reference, the initials GIO being used for convenience.

The Design consists of eight parts.

Part I indicates the nature of the proposed Organization, setting forth its general purposes, its composition, a method for its establishment, and its succession to the League of Nations.

Part II outlines the structure of the proposed Organization. It would have an Assembly in which all States could be represented and which would not be bound by the traditional rule of unanimity. It would have a Council in which a relatively small number of States would be represented, some of them continuously, and which would deal with questions primarily political. The Council would maintain a special Security Committee for preventing or suppressing the use of force. A General Commission would deal with matters not committed to the Council. The Permanent Court of International Justice would be the chief judicial authority of the GIO. The International Labor Organization would become a part of the GIO, and other existing organizations might be adapted to the structure of the GIO. Control of the budget of the GIO would be vested in the Assembly.

Part III, on the maintenance of peace and security, would confer broad powers on the Assembly and the Council. The latter would deal with any specific situation in which the peace is threatened, and it would have power to prescribe the measures, military or economic, which all States would be obligated to take for the maintenance of peace. The Security Committee

* Text below, Supplement, p. 216.

would act under the Council's direction, but in any emergency it would be able to move on its own initiative. States represented in the Security Committee would be obligated to take part in its action to the full extent of their resources. A general power to prescribe limitations with respect to armaments would be conferred on the Assembly.

Part IV would provide procedures for the pacific settlement of disputes. It would confer on the Permanent Court of International Justice a general jurisdiction over legal disputes, and the Council would have power to deal with, and if necessary to decide, any dispute not pending before the Court. If a State should fail to comply with any decision, the Council would have power to take the action required to give effect to it.

Part V would provide agencies and procedures for promoting the general welfare. The Assembly would be empowered to create special agencies in various fields, examples of which are enumerated, and the General Commission would coördinate their efforts. Each State would have a duty to observe the dictates of humanity and justice in dealing with its own population, and special provision would be made for giving attention to the problems of dependent peoples.

Part VI, concerning agreements between States, deals with the registration of treaties, with the revision of agreements not wholly performed, and with the readjustment of situations which threaten to endanger peace.

Part VII sets forth measures for safeguarding the supremacy of international law. All agreements between States would be required to be consistent with the Charter of the GIO which would be the basic instrument of international law, and the Assembly would be given power to shape the international law of the future in conformity with the Charter.

Part VIII would provide a carefully guarded procedure for amending the Charter.

The Design as a whole places emphasis on three features to which special attention is directed:

> (a) The universality of the GIO is contemplated, not as a goal of aspiration but as a fundamental concept. All existing States would at all times be comprised in the GIO. Every State would have the general obligations to keep the peace which the Charter ordains; each State would be entitled to representation in the Assembly, though only a recognized Government of the State could accredit its representatives; no States would be encouraged to form a rival and hostile organization because of their being left out. The whole community of States would be organized in the GIO, and the Charter would be the basic instrument of the law of that community. Such an extension of international law, like some of the great extensions made in the past, could be effected by the States upon which events have placed responsibility for the future—by the United Nations and such others as may associate with them for creating the GIO.
>
> (b) The Charter would create definite obligations for all States with respect to the maintenance of peace, but with respect to promoting the

general welfare it would place the emphasis on consultative arrangements for voluntary coöperation among States.

(c) The Charter would not attempt to lay out ready-made solutions of international problems. Instead, it would create agencies, procedures and methods by which solutions might be sought in the future according to the wisdom of the time.

While the members of the group were not unanimous on every point, the Design represents their general views at the present stage of their deliberations. The following men, among others, took part in the conferences devoted to the preparation of the Design, under the chairmanship of the undersigned: Frank Aydelotte, Princeton, New Jersey; Frank G. Boudreau, New York City; Malcolm W. Davis, New York City; Clark M. Eichelberger, New York City; Raymond B. Fosdick, New York City; Huntington Gilchrist, New York City; Manley O. Hudson, Cambridge, Massachusetts; Philip C. Jessup, New York City; Herbert L. May, New York City; Philip C. Nash, Toledo, Ohio; George Rublee, Washington, D. C.; James T. Shotwell, New York City; Preston W. Slosson, Ann Arbor, Michigan; Arthur Sweetser, Washington, D. C.; Quincy Wright, Chicago, Illinois; Secretary: Louis B. Sohn, Langdell Hall, Cambridge, Massachusetts.

MANLEY O. HUDSON*

*Note composed in agreement with the members of the group who had participated in the drafting of the Design.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16–AUGUST 15, 1944

(Including earlier events not previously noted)

WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. M. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

February, 1944

10 PERMANENT COURT OF INTERNATIONAL JUSTICE. Text of Report of Informal Inter-Allied Committee on the future of the Permanent Court of International Justice: *G. B. M. S.* No. 2 (1944) *Cmd.* 6531.

May, 1944

16 BELGIUM (in exile)—GREAT BRITAIN. Signed agreement at London concerning civil administration of Belgium when liberated. *N. Y. Times*, May 17, 1944, pp. 1, 5; *C. S. Monitor*, May 17, 1944, pp. 1, 7; *D. S. B.*, May 20, 1944, p. 479; London *Times*, May 17, 1944, p. 4.

16 BELGIUM (in exile)—UNITED STATES. Signed agreement in London concerning civil administration of Belgium when liberated. *N. Y. Times*, May 17, 1944, pp. 1, 5; *C. S. Monitor*, May 17, 1944, pp. 1, 7; *D. S. B.*, May 20, 1944, p. 479; London *Times*, May 17, 1944, p. 4.

16 GREAT BRITAIN—THE NETHERLANDS (in exile). Signed agreement in London, concerning the civil administration of The Netherlands when liberated. *N. Y. Times*, May 17, 1944, pp. 1, 5; *C. S. Monitor*, May 17, 1944, pp. 1, 7; *D. S. B.*, May 20, 1944, p. 479; London *Times*, May 17, 1944, p. 4.

16 GREAT BRITAIN—NORWAY (in exile)—SOVIET RUSSIA. Signed agreement in London concerning civil administration of Norway when liberated. *N. Y. Times*, May 17, 1944, pp. 1, 5; *C. S. Monitor*, May 17, 1944, pp. 1, 7; *D. S. B.*, May 20, 1944, p. 479; London *Times*, May 17, 1944, p. 4.

16 THE NETHERLANDS (in exile)—UNITED STATES. Signed agreement in London concerning the civil administration of The Netherlands when liberated. *N. Y. Times*, May 17, 1944, pp. 1, 5; *C. S. Monitor*, May 17, 1944, pp. 1, 7; *D. S. B.*, May 20, 1944, p. 479; London *Times*, May 17, 1944, p. 4.

16 NORWAY (in exile)—SOVIET RUSSIA—UNITED STATES. Signed agreement in London concerning civil administration of Norway when liberated. *N. Y. Times*, May 17, 1944, pp. 1, 5; *C. S. Monitor*, May 17, 1944, pp. 1, 7; *D. S. B.*, May 20, 1944, p. 479; London *Times*, May 17, 1944, p. 4.

18 RUSSIAN CHURCH PROPERTY IN JERUSALEM. Announcement was made of an agreement by a group of monks and nuns to recognize the authority of the Metropolitan of Moscow and to accept official Russian administration of religious property inside Jerusalem, formerly the property of the Russian Orthodox Church which never had accepted the authority of the U.S.S.R. *N. Y. Times*, May 19, 1944, p. 8.

20 ECUADOR—PERU. Announcement was made at Rio de Janeiro that Peru and Ecuador had agreed to accept in full the recommendation of the United States, Brazil and Argentina, for the settlement of their border disputes. Texts of President

Roosevelt's messages: *N. Y. Times*, May 21, 1944, p. 9; *D. S. B.*, May 20, 1944, pp. 487–488.

25/*June* 6 PRISONERS OF WAR. Announcement was made May 25 that Russia had made representation to Japan on behalf of British war prisoners and would take like action concerning United States prisoners. *N. Y. Times*, May 26, 1944, p. 3. On June 6 it was announced Russia had agreed to permit one Japanese ship to enter a specified port near Vladivostok to pick up relief supplies for American prisoners in the Orient. *N. Y. Times*, June 7, 1944, p. 11.

27 BRAZIL—GREAT BRITAIN. Effected agreement by exchange of notes at Rio de Janeiro concerning military service of their nationals. *D. S. B.*, July 9, 1944, p. 55.

29/*June* 9 PEACE. Secretary Hull issued a statement announcing his readiness to proceed with international discussions regarding formation of a world security program. Text: *N. Y. Times*, May 30, 1944, pp. 1, 7; *D. S. B.*, June 3, 1944, p. 510. British and Chinese Governments had accepted up to June 9. *N. Y. Times*, June 10, 1944, p. 9.

30 YUGOSLAV CREDITS. Announcement was made that, pending appointment of a Finance Minister, credits of the exiled Government, held at Barclay's Bank in London, had been frozen. *N. Y. Times*, May 30, 1944, p. 10.

June, 1944

1 ARGENTINA—SPAIN. Argentine Finance Ministry announced a new commercial agreement. *N. Y. Times*, June 3, 1944, p. 5.

2 ALBANIA. Text of Secretary Hull's statement concerning United States' non-recognition of Fascist annexation of Albania: *D. S. B.*, June 3, 1944, p. 510.

2 FRANCE (Provisional Government). French Committee of National Liberation decided formally to call itself the Provisional Government of the French Republic. *N. Y. Times*, June 3, 1944, p. 3.

5–7 ECUADOREAN RECOGNITION. Announcements were made of recognition of the new Government in Ecuador, set up by revolution: Brazil, Peru and Paraguay on June 5. *N. Y. Times*, June 6, 1944, p. 3. United States on June 6. *D. S. B.*, June 7, 1944, p. 536. Cuba and Nicaragua on June 7. *N. Y. Times*, June 8 and 9, 1944, pp. 14 and 5.

5/9 ITALY. On June 5 King Victor Emmanuel turned over his powers to his son, Umberto, who will reign as "Lieutenant General of the Realm." Text of decree: *N. Y. Times*, June 6, 1944, p. 1. Former Premier Ivanoe Bonomi formed a new Cabinet June 9. *N. Y. Times*, June 10, 1944, p. 1.

6 FRANCE (Provisional Government). Text of General de Gaulle's broadcast to France on D-day: *N. Y. Times*, June 7, 1944, p. 6.

6 GERMANY—PORTUGAL. Acting Secretary of State Stettinius announced that Portugal had stopped production and export of wolfram to Germany. *N. Y. Times*, June 7, 1944, p. 8; *D. S. B.*, June 10, 1944, p. 535.

6 WORLD WAR. United States, Canadian, and British troops landed in France. *N. Y. Times*, June 6, 1944, p. 1.

8 CANADA—UNITED STATES. Signed convention at Ottawa for the avoidance of double succession and estate taxation. *N. Y. Times*, June 9, 1944, p. 9; *D. S. B.*, June 10, 1944, p. 543.

GREECE (in exile). New Cabinet decided King George II must postpone his return until a popular plebiscite can decide whether the people desire him to continue as ruler. *N. Y. Times*, June 13, 1944, p. 11.

13 BELGIUM (in exile)—GERMANY. M. Pierlot broadcast the information that King Leopold had been removed to Germany on June 7. *B. I. N.*, June 24, 1944, p. 526; London *Times*, June 14, 1944, p. 4.

13 FRANCE (Vichy). All liquid assets of the Bank of France were transferred from Riom and Chamalières to Paris in German armored cars. *N. Y. Times*, June 16, 1944, p. 3.

13–*July* 16 FRANCE (Provisional Government) RECOGNITION. Poland, Belgium, Czechoslovakia and Luxembourg recognized Gen. de Gaulle's organization as the Provisional Government of France on June 13. *B. I. N.*, June 24, 1944, p. 529; London *Times*, June 14, 1944, p. 3. On June 17 the Brazzaville radio announced recognition by the Yugoslav Government. *N. Y. Times*, June 18, 1944, p. 12. On June 21 Norway granted recognition and Sweden's recognition was implied in King Gustav's telegram to Gen. de Gaulle. *N. Y. Times*, June 22, 1944, p. 3; *B. I. N.*, July 8, 1944, p. 567. The Algiers radio reported Greek recognition on July 4. *B. I. N.*, July 22, 1944, p. 608. On July 15 and 16 recognition was granted "in effect" by U.N.R.R.A. and by Iran. *N. Y. Times*, July 16 and 17, 1944, pp. 8 and 7; *B. I. N.*, July 22, 1944, p. 603.

14 ICELAND—UNITED STATES. Louis G. Dreyfus, Jr. presented his letters of credence to the Regent of Iceland as Minister of the United States. *D. S. B.*, June 17, 1944, p. 563.

15 DARDANELLES. Turkey prohibited transit of German armed vessels into the Black Sea. *B. I. N.*, June 24, 1944, p. 537.

15 FINLAND—UNITED STATES. Finland made semi-annual payment of interest on its war debt. *N. Y. Times*, June 16, 1944, p. 7.

15 WORLD ORGANIZATION. Text of President Roosevelt's statement that the United States plans a postwar international organization: *N. Y. Times*, June 16, 1944, p. 12; *D. S. B.*, June 17, 1944, pp. 552–553.

16 FINLAND—UNITED STATES. United States requested the immediate departure of Finnish Minister Procope and three assistants. *N. Y. Times*, June 17, 1944, pp. 1, 4; *D. S. B.*, June 17, 1944, p. 565.

16–17 ICELAND. Formally abrogated the Danish-Icelandic union treaty on June 16. *N. Y. Times*, June 17, 1944, p. 3. Sveinn Bjoernsson, Regent, was elected first President of Iceland on June 17. *N. Y. Times*, June 18, 1944, p. 10. Extracts from the "Act of Union" which came into force Dec. 1, 1918; *D. S. B.*, June 17, 1944, p. 559. Text of message from King Christian of Denmark: London *Times*, June 19, 1944, p. 3. Final figures of the referendum held in May on severance of the tie with Denmark: 70536–365. *N. Y. Times*, June 1, 1944, p. 9.

17 REFUGEES. Secretary of State Hull in a letter to the Emergency Advisory Committee for Political Defense, stated the United States would be willing to participate in an Inter-American effort "to rescue from German hands some thousands of oppressed minorities holding non-European documentation" by exchange for German nationals from the American Republics. *N. Y. Times*, June 18, 1944, p. 9. Text: *D. S. B.*, June 17, 1944, p. 566.

18 CZECHOSLOVAKIA (in exile)—SOVIET RUSSIA. Agreement reached whereby the Soviet Government will print Czech currency in Russia for use by Czech authorities and the Red army when it reaches Czech territory. *N. Y. Times*, June 19, 1944, p. 11.

18 YUGOSLAVIA (in exile). Communiqué announced accord on liberation aims had been reached by conferees representing Marshal Tito and the Royal Government. *N. Y. Times*, June 19, 1944, pp. 1, 10.

22 KOREA. Korean Provisional Government issued statement, addressed to the British, Chinese, United States, and Soviet Governments, asking recognition. *N. Y. Times*, June 23, 1944, p. 9.

22–*July* 26 ARGENTINA—UNITED STATES. On June 22 the United States, in notes to American Republics and Great Britain, recommended non-recognition of the Farrell régime in Argentina, because of its alleged pro-Axis character. On June 30 and July 10 the Argentine Government issued memoranda in refutation of United States claims. The Department of State on July 26 released for publication its official summary of the entire controversy. Text of statement of July 26: *D. S. B.*, July 30, 1944, pp. 107–111; *N. Y. Times*, July 27, 1944, p. 10.

23 BOLIVIAN RECOGNITION. Great Britain and 19 American nations including the United States granted recognition to the Government of Major Villarroel. *N. Y. Times*, June 24, 1944, pp. 1, 7; *D. S. B.*, June 24, 1944, p. 584; London *Times*, June 24, 1944, p. 3; *B. I. N.*, July 8, 1944, p. 564.

23 MONACO. Princess Charlotte renounced her title to the throne in favor of her 21-year-old son, Rainier. *N. Y. Times*, June 24, 1944, p. 7.

23/27 CANADA—UNITED STATES. Concluded an agreement by exchange of notes concerning reimbursement to United States for expenditures for works constructed in Canada. London *Times*, Aug. 2, 1944, p. 3; *D. S. B.*, July 30, 1944, pp. 127–128. Text of Canadian Prime Minister's statement, released August 1: *D. S. B.*, Aug. 6, 1944, pp. 139–141.

27 FINLAND—GERMANY. An official communiqué announced Finland would continue in the war against Russia, and that Germany had promised military assistance. Text: *D. S. B.*, July 2, 1944, p. 2.

28 NETHERLANDS (in exile)—VATICAN. Announced resumption of diplomatic relations, broken off by The Netherlands in 1925. *N. Y. Times*, June 29, 1944, p. 9.

29 GREAT BRITAIN—POLAND (in exile). Signed retroactive agreement for British lend-lease supplies to the Polish forces. *N. Y. Times*, June 30, 1944, p. 3; London *Times*, June 30, 1944, p. 8; *B. I. N.*, July 8, 1944, p. 571.

30 FINLAND—UNITED STATES. Diplomatic relations were broken off by the United States in a note from Secretary Hull to the Finnish Chargé. Text: *D. S. B.*, July 2, 1944, p. 2; *N. Y. Times*, July 1, 1944, p. 8; *B. I. N.*, July 8, 1944, p. 566.

July, 1944

1–22 UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE. 44 nations' representatives met on July 1 at Bretton Woods, N. H. Secretary Morgenthau was elected president of the Conference. *N. Y. Times*, July 2, 1944, pp. 1, 14. U. S. delegation: *D. S. B.*, June 24, 1944, p. 587. Organization of the Conference was completed July 3. Committee chairmen: *N. Y. Times*, July 4, 1944, p. 15. Reached agreement on quotas for stabilization fund July 15. *N. Y. Times*, July 16, 1944, p. 4. Reached agreement on quotas for Bank for International Reconstruction and Development July 21. Text of agreement on international monetary fund: *N. Y. Times*, July 23, 1944, pp. 26–27. Text of agreement for International Bank for Reconstruction and Development: *N. Y. Times*, July 24, 1944, pp. 10–11.

3 OPIUM. Following the signing of a Congressional joint resolution by President Roosevelt, Secretary Hull announced that the United States would ask other nations to limit production of opium and to exert stricter control over its traffic. *N. Y. Times*, July 4, 1944, p. 12. Text of statement: *D. S. B.*, July 9, 1944, p. 47.

12 ALBANIA—GERMANY. Announced establishment of diplomatic relations, with legations in Berlin and Tirana. London *Times*, July 13, 1944, p. 3.

12 MEXICO—UNITED STATES. Text of joint statement concerning results of the recent visit of the Mexican Foreign Minister: *N. Y. Times*, July 13, 1944, p. 3; *D. S. B.*, July 16, 1944, p. 61.

13 SPAIN—UNITED STATES. Department of State announced "agreement in principle" regarding landing rights in Spain for American aircraft, details to be worked out by technicians. *N. Y. Times*, July 14, 1944, p. 8; London *Times*, July 14, 1944, p. 3.

18 COSTA RICA—NICARAGUA. Nicaragua closed the frontier between the two countries to prevent export of merchandise to Costa Rica. *N. Y. Times*, July 19, 1944, p. 4.

25 GERMANY. Text of Hitler's 'Total war effort' decree: *N. Y. Times*, July 26, 1944, p. 5.

25 POLISH COMMITTEE OF NATIONAL LIBERATION—SOVIET RUSSIA. Russia announced that it would enter into an agreement with the Committee, on the civil administration of liberated territories in Poland. *N. Y. Times*, July 26, 1944, p. 1. Text of Russian statement: p. 4; London *Times*, July 26, 1944, p. 4.

25–*August* 8 OIL CONFERENCE. Discussions between Governments of the United States and Great Britain began July 25 in Washington. *N. Y. Times*, July 26, 1944, p. 7. Membership of delegations: *D. S. B.*, July 16, 1944, p. 62 and July 23, p. 93. Agreement was signed August 8. *C. S. Monitor*, Aug. 9, 1944, p. 1; *N. Y. Times*, Aug. 9, 1944, pp. 1, 11. Text: p. 8: *D. S. B.*, Aug. 13, 1944, pp. 154–156; *Cong. Record* (daily) Aug. 25, 1944, pp. 7388–7389.

26 POLISH COMMITTEE OF NATIONAL LIBERATION—SOVIET RUSSIA. Signed agreement on relations between the Polish administration and the Soviet command. *N. Y. Times*, July 27, 1944, p. 3. Text: *Russia. Embassy. Information Bulletin* (Washington) July 29, 1944, pp. 3–4. Summary: London *Times*, July 28, 1944, p. 3.

27 GREAT BRITAIN—LUXEMBOURG (in exile). Announced agreement concerning civil administration of Luxembourg when it is liberated. London *Times*, July 28, 1944, p. 3; *N. Y. Times*, July 28, 1944, p. 6; *D. S. B.*, July 30, 1944, p. 125.

27 GUAM. Admiral Nimitz proclaimed military government in Guam and adjacent waters. *N. Y. Times*, July 31, 1944, pp. 1, 7.

27 LUXEMBOURG (in exile)—UNITED STATES. Department of State announced agreement concerning civil administration of Luxembourg when it is liberated. *N. Y. Times*, July 28, 1944, p. 6; *D. S. B.*, July 30, 1944, p. 125; London *Times*, July 28, 1944, p. 3.

29 ARGENTINA—BRAZIL. Brazil sent a note to Argentina urging her to carry out her obligations to other American Republics. *N. Y. Times*, July 30, 1944, p. 13; London *Times*, July 31, 1944, p. 3.

29/31 POLAND (in exile)—SOVIET RUSSIA. Premier Mikolajczyk, with Foreign Minister Romer, arrived in Teheran where he received a formal invitation to visit Stalin for discussions. *N. Y. Times*, July 30, 1944, p. 1. He arrived in Moscow July 31. *N. Y. Times*, Aug. 1, 1944, p. 4.

August, 1944

1 FINLAND. Field Marshal Baron Carl Gustav Mannerheim was appointed President following the resignation of Risto Ryti. *N. Y. Times*, Aug. 2, 1944, p. 1; London *Times*, Aug. 2, 1944, p. 4.

1/10 PHILIPPINE COMMONWEALTH. Sergio Osmeña, Vice President, became President following the death of Manuel Quezon. *N. Y. Times*, Aug. 2, 1944, pp. 1, 4. Señor Osmeña appointed his Cabinet on Aug. 10. *N. Y. Times*, Aug. 11, 1944, p. 6.

2 GERMANY—TURKEY. Turkey broke diplomatic relations with Germany. *N. Y. Times*, Aug. 3, 1944, p. 1; *D. S. B.*, Aug. 6, 1944, p. 133; London *Times*, Aug. 3, 1944, p. 4.

2 POLISH COMMITTEE OF NATIONAL LIBERATION—SOVIET RUSSIA. Exchanged representatives. *N. Y. Times*, Aug. 2, 1944, p. 8.

5 ALBANIA—ITALY. Announcement was made that Italy would give up rule over Albania without formal declaration. *N. Y. Times*, Aug. 6, 1944, p. 22.

12 PRIZES OF WAR. President Roosevelt issued proclamation extending to Australia reciprocal privileges with respect to prizes captured and brought into territorial waters of the United States. *D. S. B.*, Aug. 20, 1944, p. 192.

14 FRANCE (Provisional Government). Text of call to arms addressed to the French people: *N. Y. Times*, Aug. 15, 1944, p. 5.

15 ROME. AMG returned Rome and two provinces to Italian control. *N. Y. Times*, Aug. 16, 1944, p. 9.

INTERNATIONAL CONVENTIONS

INTER-AMERICAN AUTOMOTIVE TRAFFIC. Washington, Dec. 15, 1943.
Signature:
Panama. July 13, 1944. *D. S. B.*, July 30, 1944, p. 128.
Ratification:
Brazil. May 9, 1944. *D. S. B.*, June 17, 1944, p. 567.
Dominican Republic. *D. S. B.*, Aug. 6, 1944, p. 149.
El Salvador. June 12, 1944. *D. S. B.*, July 2, 1944, p. 32.
Ratification deposited:
Dominican Republic. Aug. 4, 1944, *D. S. B.*, Aug. 27, 1944, p. 229.
Guatemala. July 6, 1944. *D. S. B.*, July 23, 1944, p. 104 and Aug. 6, 1944, p. 149.
Peru. July 25, 1944. *D. S. B.*, Aug. 6, 1944, p. 149.

INTER-AMERICAN CULTURAL RELATIONS. Buenos Aires, Dec. 23, 1936.
Ratification deposited:
Bolivia. July 24, 1944. *D. S. B.*, Aug. 6, 1944, p. 148.

INTER-AMERICAN INSTITUTE OF AGRICULTURAL SCIENCES. Washington, Jan. 15, 1944.
Ratifications:
Costa Rica. June 13, 1944. *D. S. B.*, July 23, 1944, p. 104.
Nicaragua. July 18, 1944. *D. S. B.*, Aug. 6, 1944, p. 149.
United States. June 29, 1944. *D. S. B.*, July 2, 1944, p. 32.
Ratifications deposited:
Costa Rica. Aug. 14, 1944. *D. S. B.*, Aug. 27, 1944, p. 229.
El Salvador. May 31, 1944. *D. S. B.*, June 17, 1944, p. 567.
Guatemala. July 6, 1944. *D. S. B.*, July 23, 1944, p. 104.
Signatures:
Bolivia. July 12, 1944. *D. S. B.*, Aug. 6, 1944, p. 149.
Chile. May 13, 1944. *D. S. B.*, June 3, 1944, p. 522.

OPIUM CONVENTION. 2d. The Hague, Jan. 23, 1912.
Adherence:
Afghanistan (effective May 5, 1944) *D. S. B.*, June 10, 1944, p. 543.

PAN AMERICAN HIGHWAY. Buenos Aires, Dec. 23, 1936.
Ratification deposited:
Bolivia. July 24, 1944. *D. S. B.*, Aug. 6, 1944, p. 148.

PAN AMERICAN UNION. Havana, Feb. 20, 1928.
Ratification deposited:
Bolivia. July 24, 1944. *D. S. B.*, Aug. 6, 1944, p. 148.

WHALING. Protocol. London, Feb. 7, 1944.
Accession:
Mexico. June 29, 1944. *D. S. B.*, July 30, 1944, p. 129.
Ratification:
United States. June 22, 1944. *D. S. B.*, June 24, 1944, p. 592.
Ratifications deposited:
United Kingdom. June 28, 1944. *D. S. B.*, July 23, 1944, p. 104.
United States. July 10, 1944. *D. S. B.*, July 30, 1944, p. 129.
Text: *D. S. B.*, June 24, 1944, pp. 592–593.

DOROTHY R. DART

JUDICIAL DECISIONS

GREAT NORTHERN LIFE INSURANCE COMPANY *v.* READ

SUPREME COURT OF THE UNITED STATES*

[April 24, 1944.]

The inherent nature of sovereignty prevents actions against a state without its consent, and this immunity is not waived merely by membership in the Federal Union, whose courts are not State courts for this purpose.

Mr. Justice REED delivered the opinion of the Court.

This writ brings here for review the action of petitioner, a foreign insurance company, to recover taxes paid to respondent, the Insurance Commissioner of Oklahoma, which were levied by Section 10478, Oklahoma Statutes 1931, as amended by Chapter 1 (a), Title 36, Session Laws of Oklahoma 1941. This was an annual four per cent tax on premiums received by foreign insurance companies in Oklahoma, and it, together with certain specified fees, was in lieu of all other taxes and fees in Oklahoma. Petitioner paid the tax under protest and, alleging diversity of citizenship, 28 U. S. C. § 41, brought suit against the Insurance Commissioner in the District Court of the United States. The procedure for recovery is laid down by Section 12665, Oklahoma Statutes 1931.[1]

The percentage of premiums due was increased from two to four per cent by the amendment of 1941, effective April 25th of that year. The District Court refused recovery. The Circuit Court of Appeals affirmed. *Great Northern Life Insurance Co.* v. *Read*, 136 F. 2d 44. Certiorari was granted on petitioner's assertion of error in requiring it to pay a tax allegedly discriminatory under the Fourteenth Amendment as compared with the taxa-

* No. 235. October Term, 1943.

[1] "12665. Payment Under Protest Where Relief by Appeal Not Provided—Action to Recover.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

tion of domestic insurance companies, and also unconstitutional as levied after the company's admission to the state and on premiums collected during the business year for which a license was already in force. A conflict in principle was suggested with *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494. We granted certiorari, 320 U. S. 726, and asked discussion of the right of petitioner to maintain its suit in a Federal court. As we conclude that this suit could not be maintained in the Federal court, we do not reach the merits of the issue as to the validity of the tax.

The right of petitioner to maintain this suit in a Federal court depends, first, upon whether the action is against an individual or against the State of Oklahoma. Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the Federal court.

Respondent challenged the right of petitioner to seek relief in the District Court by the defense in its answer that the complaint fails to state a claim upon which relief can be granted. R. C. P. 12 (b) and (e).[2] This challenge, on the ground that the state had not consented to be sued, was sustained by the District Court. The contention is available here to sustain the judgment on appeal. *LeTulle* v. *Scofield*, 308 U. S. 415.

In *Smith* v. *Reeves*, 178 U. S. 436, an action was instituted in the Federal trial court by railroad receivers against the defendant "as Treasurer of the State of California" to recover taxes assessed against and paid by the railroad. The proceeding was brought under Section 3669 of the California Political Code, as amended by California Statutes (1891) 442, which authorized a suit against the State Treasurer for the recovery of taxes which were illegally exacted. The defendant could demand trial of the action in the Superior Court of the County of Sacramento, California. If the final judgment was against the Treasurer, the Comptroller of the state was directed to draw his warrant on state funds for its satisfaction.

As the suit was against a state official as such, through proceedings which were authorized by statute, to compel him to carry out with the state's funds the state's agreement to reimburse moneys illegally exacted under color of the tax power, this Court held, p. 439, it was a suit against the state. The state would be required to pay.[3] The case therefore is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state law, *Atchison &c. Ry. Co.* v. *O'Connor*, 223 U. S. 280; cf. *Matthews* v. *Rodgers*, 284 U. S. 521, 528; to

[2] There is here no want of jurisdiction of the parties or subject matter. We are not passing upon a certification of an issue as to jurisdiction such as arose under the Act of March 3, 1891, § 5, 26 Stat. 827, in Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28, 37. If this is a suit against the state, a failure to show the state's consent to be sued in the face of this answer would be fatal. Cf. Berryessa Cattle Co. *v.* Sunset Pacific Oil Co., 87 F. 2d 972, 974.

[3] Pennoyer *v.* McConnaughy, 140 U. S. 1, 10. Compare Louisiana *v.* Jumel, 107 U. S. 711, 726.

recover under general law possession of specific property likewise wrongfully obtained or held, *Tindal* v. *Wesley*, 167 U. S. 204, 221; *Virginia Coupon Cases*, 114 U. S. 269, 285; *United States* v. *Lee*, 106 U. S. 196; to perform a plain ministerial duty, *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Rolston* v. *Missouri Fund Com'rs*, 120 U. S. 390, 411; or to enjoin an affirmative act to the injury of plaintiff, *Sterling* v. *Constantin*, 287 U. S. 378, 393; *Tomlinson* v. *Branch*, 15 Wall. 460; *Davis* v. *Gray*, 16 Wall. 203, 220; *In re Tyler*, 149 U. S. 164, 190. Only in *Smith* v. *Reeves* was the action authorized by statute against the officer in his official capacity. In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally.

This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. *Chandler* v. *Dix*, 194 U. S. 590; *Fitts* v. *McGhee*, 172 U. S. 516, 529; *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 167; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 468 *et seq.*; *Ex parte State of New York, No. 1*, 256 U. S. 490, 500; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 296, 299. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. *Monaco* v. *Mississippi*, 292 U. S. 313, 320; *Louisiana* v. *Jumel*, 107 U. S. 711, 720. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. *Hans* v. *Louisiana*, 134 U. S. 1, 10, 16.

Oklahoma provides for recovery of unlawful exactions paid to its collectors under protest. Section 12665 Oklahoma Statutes 1931. Note 1, *supra*. In our view of this case it is unnecessary for us to pass upon whether this method of protecting taxpayers was intended to be exclusive of all other remedies, including actions against an individual who happened to be a tax collector, or whether if it were so intended it would surmount all constitutional objections. Compare *Burrill* v. *Locomobile Co.*, 258 U. S. 34, and *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 341–43. See also *Antrim Lumber Co.* v. *Sneed*, 175 Okla. 47, 49–51, 52 P. 2d 1040, 1043–45.

A suit against a state official under Section 12665 to recover taxes is held to be a suit against the state by Oklahoma and the remedy exclusive of other state remedies. *Antrim Lumber Co.* v. *Sneed, supra*, 175 Okla. at 51, 52 P. 2d at 1045. This interpretation of an Oklahoma statute by the Supreme Court of the state accords with our view, as set out above, of the meaning of a suit against a state. Petitioner brought this action against the collector, the Insurance Commissioner, in strict accord with the requirements of Section 12665. It alleged that there was no appeal provided by Oklahoma

laws from defendant's action in collecting and gave notice of protest and suit to defendant at the time of payment in the language of the Section. By so doing petitioner was relieved of the necessity of establishing that the payment was not voluntary [4] and obtained the advantage of a statutory lien *lis pendens* on the tax payment.

By Section 12665, Oklahoma creates a judicial procedure for the prompt recovery by the citizen of money wrongfully collected as taxes. It is the sovereign's method of tax administration. Oklahoma designates the official to be sued, orders him to hold the tax, empowers its courts to do complete justice by determining the amount properly due and directs its collector to pay back any excess received to the taxpayer. The state provides this procedure in lieu of the common law right to claim reimbursement from the collector. The issue of coercion and duress was eliminated at the pre-trial conference without objection by the petitioner. The section makes sure the taxpayer's recovery of illegal payments. The section is like the California statute involved in *Smith* v. *Reeves, supra*, except for the immaterial difference that the money collected is directed to be held separate and apart by the collector instead of being held in the general funds of the State Treasurer. See § 3669, California Political Code, as amended by California Statutes (1891) 442. In the *Reeves* case, as here, the suit was against the official, not the individual. The Oklahoma section differs from the Colorado law, Section 6, Chapter 211, Session Laws of Colorado 1907, considered in *Atchison &c. Ry. Co.* v. *O'Connor, supra*, in that the Colorado statute left the taxpayer to his remedy against the collector and merely directed the refund of the tax by the Treasurer in accordance with any judgment or decree which might be obtained. In the *O'Connor* case, in accordance with the statute, the suit, as this Court's opinion shows, was against the individual, not the official. We are of the view that the present proceeding under § 12665 is like *Smith* v. *Reeves*, a suit against the state.

But it is urged that if this is a suit against the state, Oklahoma has consented to this action in the Federal court. Cf. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedure. *Antrim Lumber Co.* v. *Sneed*, 175 Okla. 47, 52 P. 2d 1040; *Patterson* v. *City of Checotah*, 187 Okla. 587, 103

[4] Board of Com'rs Love Co. *v.* Ward, 68 Okla. 287, 288; Broadwell *v.* Board of Com'rs Carter Co., 71 Okla. 162, 163; cf. Ward *v.* Love Co., 253 U. S. 17, 22; Broadwell *v.* Carter Co., 253 U. S. 25; Carpenter *v.* Shaw, 280 U. S. 363, 369; Railroad Co. *v.* Commissioners, 98 U. S. 541, 544; Stratton *v.* St. L. S. W. Ry., 284 U. S. 530, 532.

P. 2d 07; *Beers* v. *State of Arkansas*, 20 How. 527; *Kawananakoa* v. *Polyblank*, 205 U. S. 349; *Minnesota* v. *United States*, 305 U. S. 382, 388; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512.[5] The immunity may, of course, be waived. *Clark* v. *Barnard*, 108 U. S. 436, 447. When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, *Traction Company* v. *Mining Company*, 196 U. S. 239, 255, but when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.[6]

The Oklahoma section in question, 12665, was enacted in 1915 as a part of a general amendment to then existing tax laws. Session Laws 1915, p. 149, Chap. 107, Art. One, subdivision B, sec. 7.[7] This subdivision of the act of 1915 is concerned with administrative review of boards of equalization and provides a complete procedure including review by the district and Supreme Court of Oklahoma, as the case may be, which are given authority to affirm, modify or annul the action of the boards. Sections 2 and 3. Section 6 requires the payment of the taxes which fall due, pending administrative review, and provides for recovery of such taxes in accordance with the ultimate finding on review in language practically identical with that of Section 7 (§ 12665) here involved. Furthermore, section 12665 gives directions to the Oklahoma officer as to his obligations, requires the court to give precedence to these cases and directs the kind of judgment to be returned, see note 1, *supra*, which is quite different in language, if not in effect, from the judgment a Federal court would render. It is clear to us that the legislature of Oklahoma was consenting to suit in its own courts only. *Chandler* v. *Dix*, 194 U. S. 590.

Smith v. *Reeves*, *supra*, p. 445, holds that an act of a state is valid which limits to its own courts suits against it to recover taxes. There California's intention to so limit was made manifest by authorizing the state officer to demand trial in the Superior Court of Sacramento County. *Atchison &c. Ry. Co.* v. *O'Connor*, considered above at p. 5, is not applicable since it was not a suit against the state.

Petitioner urges that *Smyth* v. *Ames*, 169 U. S. 466, 517, and *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S. 362, 391, 392, are precedents

[5] Keifer & Keifer *v.* R. F. C., 306 U. S. 381, is not to the contrary. When authority to sue is given that authority is liberally construed to accomplish its purpose. United States *v.* Shaw, 309 U. S. 495, 501.

[6] Cf. Matthews *v.* Rodgers, 284 U. S. 521, 525. The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court. Stanley *v.* Schwalby, 162 U. S. 255, 270; Minnesota *v.* United States, 305 U. S. 382, 384, 389.

[7] See also Session Laws 1913, Ch. 240, Art. 1, sec. 7.

which lead to a contrary conclusion on this issue of the suability of Oklahoma in the District Court of the United States. The former is clearly inapposite. That case involved proceedings to enjoin enforcement of an allegedly unconstitutional state statute providing for intrastate railroad rates. Since the state act provided a remedy, the state took the position that Federal equity jurisdiction was ousted. This Court held the Federal equity jurisdiction continued to restrain unconstitutional acts by state officers which threatened irreparable damage. Pp. 474, 477, 515–19.

In the *Reagan* case, a proceeding for injunction to restrain the members of the Texas Railroad Commission from enforcing rates which were alleged to be unconstitutional was allowed to be maintained in equity in a Federal court. This Court said it was maintainable against the defendants both under the general equity jurisdiction of the Federal courts and under the provisions of the state statute which allowed review "in a court of competent jurisdiction in Travis County, Texas . . . ." It was thought that the United States Circuit Court, sitting in Travis County, was covered by this language. As it was concluded, however, that this was not a suit against the state, page 392, we do not feel impelled to extend the ruling of the *Reagan* case on this alternative basis of jurisdiction to a suit, such as this, against a state for recovery of taxes.

Gunter v. *Atlantic Coast Line*, 200 U. S. 273, is also distinguishable. There the Attorney General of South Carolina appeared in a Federal court to answer for the state in an injunction suit under the authority of a statute which read as follows:

> "if the State be interested in the revenue in said action, the county auditor shall, immediately upon the commencement of said action, inform the Auditor of State of its commencement, of the alleged cause thereof, and the Auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State." P. 286.

This Court construed this to consent to an appearance in the Federal court and held its decision res judicata against the state and added at p. 287:

> "If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the Pegues case, and by the action as well as non-action which followed the decision of that case by the state government in all its departments through a long period of years."

The administrative construction by a state of these statutes of consent have influence in determining our conclusions. Cf. *Farish* v. *State Banking Board*, 235 U. S. 498, 512; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44, 47; *Missouri* v. *Fiske*, 290 U. S. 18, 24.

It may be well to add that the construction given the Oklahoma statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by the state courts. *Chandler* v. *Dix*, 194 U. S. 590, 592; *Smith* v. *Reeves*, 178 U. S. 436, 445.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to dismiss the complaint for want of jurisdiction.

Mr. Justice FRANKFURTER, with whom the CHIEF JUSTICE and Mr. Justice ROBERTS concur, dissenting.

To avoid the imposition of penalties and other serious hazards, the plaintiff paid money under claim of a tax which Oklahoma, we must assume, had no power to exact. Concededly, he could sue to recover the moneys so paid to the defendant, a tax collector, in a state court in Oklahoma. But to allow the suit to be brought in a federal court sitting in Oklahoma would derogate, this Court now holds, from the sovereignty of Oklahoma. Such a result, I believe, derives from an excessive regard for formalism and from a disregard of the whole trend of legislation, adjudication and legal thought in subjecting the collective responsibility of society to those rules of law which govern as between man and man.

To repeat, this is a simple suit to get back money from a collector who for present purposes had no right to demand it. So far as the federal fiscal system is concerned, this common law remedy has been enforced throughout our history, barring only a brief interruption.[8] See *United States* v. *Nunnally Investment Co.*, 316 U. S. 258. And if, instead of avoiding the serious consequences of not paying this state tax, the plaintiff had resisted payment and sought an injunction against the tax collector for seeking to enforce the unconstitutional tax, under appropriate circumstances the federal courts would not have been without jurisdiction. See, *e.g.*, *Western Union Telegraph Co.* v. *Trapp*, 186 Fed. 114; *Ward* v. *Love County*, 253 U. S. 17; *Carpenter* v. *Shaw*, 280 U. S. 363. Finally, as I read the opinion of the Court, even a suit of this very nature for the recovery of money paid for a disputed tax will lie against the collector in what is called his individual capacity; that is, a suit against the same person on the same cause of action for the same remedy can be brought, if only differently entitled. In view of the history of such a suit as this and of the incongruous consequences of disallowing it in the form

[8] The Swartwout scandal led to the Act of March 3, 1839 (§ 2, 5 Stat. 339, 348), which this Court construed as a withdrawal of the suability of the collector. Cary *v.* Curtis, 3 How. 236. That decision was rendered on January 21, 1845, and Congress promptly restored the old liability. Act of Feb. 26, 1845, c. XXII, 5 Stat. 727. See Brown, *A Dissenting Opinion of Mr. Justice Story* (1940) 26 Va. L. Rev. 759. Again, in view of the complicated administrative problems raised by the invalidation of the Agricultural Adjustment Act, Congress devised a special scheme for the recovery of the illegal exactions made under the Act. 49 Stat. 1747, 7 U. S. C. § 644 *et. seq.*; Anniston Mfg. Co. *v.* Davis, 301 U. S. 337.

in which it was a case in the federal court in Oklahoma, the claims of sovereignty which are sought to be respected must surely be attenuated and capricious.

The Eleventh Amendment has put state immunity from suit into the Constitution. Therefore, it is not in the power of individuals to bring any State into court—the State's or that of the United States—except with its consent. But consent does not depend on some ritualistic formula. Nor are any words needed to indicate submission to the law of the land. The readiness or reluctance with which courts find such consent has naturally been influenced by prevailing views regarding the moral sanction to be attributed to a State's freedom from suability. Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see *Kawananakoa* v. *Polyblank*, 205 U. S. 349, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that "it is a wholesome sight to see 'the Crown' sued and answering for its torts." 3 Maitland, Collected Papers, 263.[9]

Assuming that the proceeding in this case to recover from the individual moneys demanded by him in defiance of the Constitution is a suit against the State, compare *Ex parte Young*, 209 U. S. 123, 155; *Atchison, &c. Ry. Co.* v. *O'Connor*, 223 U. S. 280, Oklahoma has consented that he be sued. The only question therefore is as to the scope of the consent. Has she confined the right to sue to her own courts and excluded the federal courts within her boundaries? She has not said so. Is such restriction indicated by practical considerations in the administration of state affairs? If it makes any difference to Oklahoma whether this suit against a tax collector is pressed in an Oklahoma state court rather than in a federal court sitting in Oklahoma, the difference has not been revealed. There is here an entire absence of the considerations that led to the decision in *Burford* v. *Sun Oil Co.*, 319 U. S. 315. There it was deemed desirable, as a matter of discretion, that a federal equity court should step aside and leave a specialized system of state administration to function. Here the suit in a federal court would not supplant a specially adaptable state scheme of administration nor bring into play the expert knowledge of a state court regarding local conditions. The subject matter and the course of the litigation in the federal court would be precisely the same as in the state court. The case would merely be argued in a different building and before a different judge. Language restrictive of suit in

[9] "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Doubtless this statement of Dicey's, *Law of the Constitution*, 8th Ed. at p. 189, 9th Ed. at p. 193, was an idealization of actuality. But in the perspective of our time its validity as an ideal has gained and not lost.

a federal court is lacking, and intrinsic policy does not suggest restrictive interpretation to withdraw from a federal court questions of federal constitutional law.

Legislation giving consent to sue is not to be treated in the spirit in which seventeenth century criminal pleading was construed. Only by such overstrained rendering of the Oklahoma Statue does the Court finally achieve exclusion of the right of the plaintiff to go to a federal court. To the language of that Statute I now turn. By § 12665 Oklahoma Statutes, 1931, the State authorized an action to recover moneys illegally exacted as a tax, in a situation like the present, where the exaction is one "from which the laws provide no appeal". The relevant jurisdictional provision is as follows: "All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein . . . ." The part that the federal courts play in the grant of such jurisdiction by the States is not a new problem. With his customary hard-headedness Chief Justice Waite, for this Court, stated the guiding consideration in ascertaining the relation of the federal court within a State to the judicial process recognized by that State: "While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for." *Ex parte Schollenberger*, 96 U. S. 369, 377. This conception of a federal court as a court within the State of its location has ever since dominated our decisions. See, *e.g.*, *Traction Company* v. *Mining Company*, 196 U. S. 239, 255–56; *Neirbo Co.* v. *Bethelem Corp.*, 308 U. S. 165, 171. It is a conception which has been acted upon by state legislatures. For jurisdictional purposes federal courts have been assimilated to the courts of the States in which they may sit. When we are dealing with jurisdictional matters legislation should be interpreted in the light of such professional history. Even if an ambiguity could be squeezed out of a grant of jurisdiction which applies so aptly to a federal court in Oklahoma as to an Oklahoma state court—"(suits shall be brought in the court having jurisdiction thereof"—neither logic nor history nor reason counsels an interpretation that attributes to the State hostility against a suit in a federal court on an exclusively federal right as to which the last say in any event belongs to a federal court.[10]

In the past, even when the jurisdictional grant has been couched in language giving substantial ground for the argument of restriction of jurisdiction to the state court, this Court has not found denial by a State of the right to go to a federal court within that State when it in fact opened the door of its own courts. Thus, in *Traction Company* v. *Mining Company*, *supra*,

[10] Of course the State can at any time withdraw its consent to be sued. See Beers *v.* State of Arkansas, 20 How. 527. But statutes have steadily enlarged the range of a state's suability and rarely has there been a recession. See, generally, Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform* (1934) 20 A. B. A. J. 747; Borchard, *Governmental Responsibility in Tort* (1926) 36 Yale L. J. 1, 17, (1927) 36 Yale L. J. 757, 1039, (1928) 28 Col. L. Rev. 577, 735.

a Kentucky statute required, among other things, appointment of commissioners in a condemnation proceeding by the county court, examination of the report at its first regular term, issuance of orders in conformity with the Kentucky Civil Code of Practice and allowance of appeals from the county courts. And yet this Court held, as a matter of construction, that it was "not to be implied from the statute in question that the State intended to exclude . . . the Federal courts". 196 U. S. at 256. The Section now under consideration is only one of several statutory provisions for challenging like tax assessments in courts. In all the other provisions, the jurisdiction is explicitly given only to state courts. See, *e.g.*, § § 12651, 12660, 12661. If in §12665 Oklahoma has seen fit to allow suits to be brought "in the court having jurisdiction thereof", which as a matter of federal jurisdictional law certainly includes the federal court in Oklahoma, and has not seen fit to designate the state courts for such jurisdiction, why should this Court interpolate a restriction which the Oklahoma Legislature has omitted? The fact that the Legislature has also provided that such suits "shall have precedence" is no more embarrassment to federal jurisdiction than to state jurisdiction. That is merely an admonition to courts of the importance of disposing of litigation affecting revenue with all convenient dispatch. Nor is there any other provision of the Statute giving this right of action that remotely requires a procedure to be followed or relief to be given peculiar to state courts or different from established procedure and relief in the federal courts. Only on the assumption that federal courts are alien courts is there anything in § 12665 that is not as suited to a proceeding in a federal court as it is to one in a state court.

The situation thus presented by the Oklahoma legislation is very different from that which was here in *Chandler* v. *Dix*, 194 U. S. 590. There a suit was brought against state officials to remove a cloud on title to lands claimed by the State. The relief that was sought and the procedure for pursuing it plainly indicated "that the legislature had in mind only proceedings in the courts of the State. A copy of the complaint is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the Auditor General, and this is to be in lieu of service of process. It then is left to the discretion of the Auditor General to cause the Attorney General to represent him, and it is provided that in such suits no costs shall be taxed. These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control. . . . [The] statute does not warrant the beginning of a suit in the Federal Court to set aside the title of the State." 194 U. S. at 591–592. The marked difference between the Michigan Statute and this Oklahoma Statute is further evidenced by the fact that §12665 gives an action to recover not merely illegal state taxes but also taxes of the "county or sub-divison of the county" that have been illegally collected. But counties or their sub-divisions do not enjoy immunity from suit. *Lincoln County* v. *Luning*, 133 U. S. 529; *Port of Seattle*

v. *Oregon & W. R. R.*, 255 U. S. 56, 71. If the other jurisdictional requirements are present, they can be sued in a federal court without the leave of Oklahoma. It is not, I submit, a rational way to construe the Oklahoma Statute, dealing with a particular type of illegal exaction raising the same kind of issue and involving the same procedure, so as to recognize jurisdiction of federal courts over suits against the county and its sub-division but to find a purpose to exclude suits as to illegal state exactions.

I have proceeded on the assumption that the action below was under § 12665, and as such an action against the State. But the suit was not brought under § 12665. It was brought as an ordinary common law action for the recovery of money against an officer acting under an unconstitutional statute. The defendant answered the suit, but did not claim the State's immunity from suit and the court's resulting lack of jurisdiction. What is even more significant is that he did allege lack of jurisdiction on another ground not now relevant. In a word, the defendant did not claim, on behalf of the State, the immunity which this Court now affords him. He did not even make this claim at the pre-trial conference and the claim did not emerge as one of the issues defined by the pre-trial conference under Rule 16. In disposing of the case, the Judge interpreted the action as having been brought under § 12665, although the pleadings gave no warrant for such conclusion, and on such interpretation, he found that the defendant could claim and had not waived Oklahoma's immunity. Evidently, however, the District Court was not content with its own finding of want of "jurisdiction" for it proceeded to dispose of the constitutional issues on their merits. I think that the claim of the State's immunity was not in the case under *Illinois Central Railroad Co.* v. *Adams*, 180 U. S. 28, which held that in a suit nominally against an individual sovereign immunity is a defense that must be raised by appropriate pleading. Doubtless for this reason, the jurisdictional question on which the case is now made to turn was not even discussed by the Circuit Court of Appeals.

That court, I believe, was right in passing on the constitutional merits, but since the case here goes off on jurisdiction, I intimate no views upon them.

In re ZALEWSKI

COURT OF APPEALS

STATE OF NEW YORK*

[April 13, 1944]

Under the treaty of 1931 between the United States and Poland the consul-general of Poland may, without direct authorization by or communication from a decedent's widow who resides in and is a national of Poland, exercise on her behalf the right of election given to her by section 18 of the Decedent Estate Law to take against the decedent's will. The powers of the consul-general are not those of a mere spokesman or conservator. He is a personal agent of his national, "charged with doing what the individual himself might do to defend his interests under the local law if he were present and competent." Rules for the interpretation of treaties.

Present: LEHMAN, Ch.J.; LOUGHRAN, RIPPEY, LEWIS, CONWAY, DESMOND and THACHER, JJ.

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 23, 1942, which unanimously affirmed a decree of the Kings County Surrogate's Court (Wingate, S.; opinion 177 Misc., 384), settling the account of the executor of Joseph Zalewski, deceased. The appeal was taken from such portions of the order of the Appellate Division as affirmed provisions of the decree pertaining directly or indirectly to the question of the validity of a right of election filed on behalf of appellant Felicja Zalewski, as surviving spouse of the decedent. The decree provided that objections filed by the Consul-General of the Republic of Poland to the rejection by the executor of appellant's claim to a right of election to take an intestate share of the estate as surviving spouse of the decedent pursuant to a notice of election filed on her behalf by said consul-general, should be dismissed.

Joseph B. Blum and Joseph H. Stein for appellant.

Thomas J. Snee for respondent.

DESMOND, J.—We gave permission for this appeal so that we might pass on this question: Can the Consul-General of the Republic of Poland, under the existing treaty between his government and the Government of the United States, and without direct authorization by, or communication from, his national who resides in Poland, validly exercise on her behalf the right accorded her by Section 18 of the Decedent Estate Law, to "take against the Will" of her late husband? The will's only provision for the absent wife is a legacy of $100. Since the net estate amounts to about $8,500, it is obviously to her advantage that there be protection of her statutory right to take, in contravention of the will, one third of her husband's net estate. The grant of authority on which the Consul-General relies, in his effort to furnish such protection, is Article XXIV of the 1931 "Treaty of Friendship,

* 292 N. Y. 322. This case as printed in the July number of the JOURNAL had been seriously garbled in the composition; it is reprinted here in correct form.—Ed.

Commerce and Consular Rights" between Poland and the United States, reading as follows: "Article XXIV: A consular officer of either High Contracting Party shall, within his district, have the right to appear personally or by delegate in all matters concerning the administration and distribution of the estate of a deceased person under the jurisdiction of the local authorities for all such heirs or legatees in said estate, either minors or adults, as may be non-residents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney to represent them unless such heirs or legatees themselves have appeared either in person or by duly authorized representative."

The surrogate agreed with the consul-general's assertion that the latter is, under this treaty and under general international law, an attorney in fact for his national. He ruled, however, that the widow was not, in these circumstances, one of the "heirs or legatees" to whom the treaty refers and ruled further that any exercise of the "personal right of election" granted to the widow by Section 18, requires "personal action by the benefited individual."

In arriving at the meaning of the treaty we are bound to remember that it is the supreme law of the land (U. S. Const. Article VI; *Geofroy* v. *Riggs*, 1933 U. S., 258), that its words are to be taken liberally in the light of evident purposes (*Hauenstein* v. *Lynham*, 100 U. S., 483) and that, since the pact is done in counterparts, one in each language, little use can be made of local technical definitions of words (*United States* v. *Percheman*, 7 Pet., 51). When two constructions of a treaty are admissible, one restrictive of the rights that may be claimed under it and the other liberal, the latter is always to be preferred (*Hauenstein* v. *Lynham*, *supra*). "This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law" (*The Bello Corrunes*, 6 Wheat, 152, 171). Those settled rules of construction forbid the employment of so restricted a meaning as was given below to the words "heirs or legatees." While these are words of art when found in certain settings, they take on in an international treaty the broader intendments which the purposes of the "High Contracting Parties" require. It is not permissible, therefore, to exclude Mrs. Zalewski, as did the surrogate, from the rank of "heir" on the ground that the case is not one of intestate distribution or to refuse her the protection due a "legatee" because her asserted right to take one third is not based on anything in the will. In truth, she is, even under local meanings of the terms, both an "heir" (by statutory definition, Decedent Estate Law, sec. 47-c) and a "legatee" (since the will contains a small bequest to her). This treaty will be receiving something less than "liberal" treatment if she is held not to be one of the persons for whom the consul-general may intervene in our Surrogates' Courts.

The narrow meaning given below to the words of the statutes, "personal

right of election," must be discarded, also. The distinguished commission which drafted Section 18 of the Decedent Estate Law gave us a valuable clue to the meaning of "personal right of election" when it informed the Legislature (see 1928 report, note to Section 18) that "such right of election if not previously exercised will be lost upon the death of the surviving spouse and will not pass to his or her executor or administrator." "This is similar," wrote the commission, "to the personal right of the widow to elect against a testamentary provision in lieu of dower, which right ends upon her death" (citing *Flynn* v. *McDermott*, 183 N. Y., 62; *Camardella* v. *Schwartz*, 126 App. Div., 334; *Youngs* v. *Goodman*, 240 N. Y., 470). We find no basis for a holding that "personal" means anything more in this statute than it did in the dower cases which the commission cited. Under those cases, the "personal" character of the election had the result that the privilege of a widow to elect to take her dower rights did not pass to her legal representatives (*Flynn* v. *McDermott*, *supra*, at p. 65; *Youngs* v. *Goodman*, *supra*, at p. 473). That this was what the Legislature had in mind when it inserted the word "personal" in Section 18 has been held in many Surrogate Court decisions since *Matter of Mihlman* (140 Misc., 535). The commission's own indication as to the significance of the word "personal" in Section 18 makes it unnecessary, we think, to rely on the legislative admonition that these statutes "shall be liberally construed" to carry out the intention "to increase the share of a surviving spouse in the estate of a deceased spouse" (L. 1929, chap. 229, sec. 20; see *Matter of Byrnes*, 260 N. Y., 465, 472).

Of course, the right to elect is "personal" in the sense that an election must in each case be a conscious, individually made choice between the statutory provision and the testamentary provision (see *Matter of Hills*, 264 N. Y., 349, 355). The statute (Sec. 18, subdiv. 7) says that the choice between those alternatives shall be made "by serving written notice of such election upon the representative of the estate," but nothing suggests that the Legislature intended thereby to require a writing subscribed by the widow's own hand. It has been assumed that the act prescribed may be performed by the spouse herself "or by her duly authorized agent or attorney in fact" (*Matter of Banks*, 31 N. Y. S., 2d, 652, 655). In the Supreme Court of Pennsylvania there is direct authority that such a notice of election may be signed, on behalf of the widow, by one holding a power of attorney in general terms which did not specifically confer authority to make such an election (*Celenza's Estate*, 308 Penn. St., 186). The Appellate Division, in its opinion for affirmance in the present case, expressed the view that neither the common law nor the treaty entitled the consul "to exercise a right which was personal to the widow" (265 App. Div., 878). It made the further observation that "the office of the Consul is no more extensive in that respect than that of a committee of an incompetent" (citing *Matter of Hills*, 264 N. Y., 349, 353; *Matter of Brown*, 212 App. Div., 677, 679, aff'd 240 N. Y., 646). That view fails, we think, to take into account the controlling

fact that the Polish-American treaty in terms gives the consul-general the same powers as if he held a power of attorney from the "heirs or legatees." The Brown case (*supra*) asserted the power of a court of equity to make an election, as to dower, on behalf of an incompetent widow. Section 18 gives statutory sanction to such an exercise of equitable powers for the safeguarding of an insane widow's rights under Section 18. But we are here examining into the authority of one who by treaty has been constituted the attorney in fact of his absent national. Powers of attorney to represent interested parties have traditionally been recognized in the Surrogate's Court (see Surrogate's Court Act, sec. 231-b). No limitation of this consul's agency is expressed in the treaty save only that he is not to act if the heirs or representatives themselves have appeared in person or by duly authorized representatives. The consul's treaty-created power of attorney is, like any similar grant, "to be construed according to the natural meaning of the words in view of the purpose of the agency and the needs of its fulfillment" (*Porges* v. *U. S. Mort. & Trust Co.*, 203 N. Y., 181, 188). It is to be interpreted in the light of the situation, the parties, the subject matter involved, and general usages (Restatement of the Law of Agency, secs. 32, 34, 37). The coverage of the agency must not be so strictly delimited as to defeat its very purpose (*Matter of McArthur*, 173 App. Div., 517, 519). We think the narrowing walls erected by the courts below go far toward barring the consul from all right to do anything effective or practical in the interest of his absent fellow-countryman. His commission from his government (and from ours) to "appear" for Mrs. Zalewski and to "represent" her must, in common sense, assign to him duties more helpful and useful to her than that of merely standing mute at the bar of the Surrogate's Court.

Whatever the word "appear" may mean in the case of attorneys at law, it does not operate to narrow the role of the consul to that of a mere spokesman, powerless without specific instructions, especially when the word "appear" is linked in the treaty with the explanatory phrase "as if he held their power of attorney to represent them." If the consul had definite instructions from his national, he would not need the treaty as his credential. If the absent national had communicated her wishes to any "duly authorized representative," Article XXIV would be out of the picture. The result of the decisions below in this proceeding is to close the doors of the court on the consul, unless he can show formal authorization from his national, whereas the treaty shows on its face that the consul is to take part in the proceedings only when there is absence of any such formal authorization running to him or to anybody else (see *Matter of Kolodziej*, 153 Misc., 115).

The effect we give herein to Article XXIV is not only a "sensible and reasonable" one (*Hamilton* v. *Erie RR. Co.*, 219 N. Y., 343, 353), but is in harmony, also, with the long trend of authority in this country. Discussions as to the nature and extent of consular authority to represent nationals in

our courts usually begin with the case of *The Bello Corrunes* (*supra*) decided in 1821. That decision was cited by the surrogate in his opinion here, as stating "a familiar principle of law that foreign consular representatives are deemed international attorneys in fact for their nationals" (177 Misc., 384, 386). In *The Bello Corrunes* the Spanish Vice-Consul could point to no treaty provision setting forth his rights; nonetheless he was held entitled, by virtue of his office, to the privilege of suing in one of our courts of admiralty for return of a ship owned by Spaniards whose very names he did not know. "A Vice-Consul duly recognised by our Government," wrote Justice Johnson "is a competent party to assert or defend the rights of property of the individuals of his nation, in any Court having jurisdiction of causes affected by the application of international law" (p. 168). A few years earlier Justice Story, on circuit, wrote an opinion in *Rowe* v. *Brig* (Fed. Cas. No. 12093) upholding the right of a Spanish Consul to defend in court, on behalf of absent and unknown Spanish owners, against a claim made by salvors. In 1851 another federal judge wrote (*Robson* v. *Huntress*, Fed. Cas. No. 11971) that "the right of a consul to intervene on behalf of citizens of his own country who are absent but interested, seems too well established in practice to be doubted." In Alabama (*Carpigniani* v. *Hall*, 172 Ala., 287) the court found authority in "the law and comity of nations" for allowing the Italian Consul, without treaty provision or authorization by his interested nationals, to petition for the removal of an administrator who had obtained his appointment through fraud. The New York decisions have followed this trend. In *Matter of Tartaglio* (12 Misc., 245, 246), a much-cited case, the court, while passing on the right of an Italian Consul to demand and receive for his nationals their distributive shares of an estate, wrote that the word "defend" in the applicable treaty "is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's countrymen, and our local as well as federal judiciary must, in obedience to the treaty, recognize such rights." The surrogate in that opinion expressed the view that "in the absence of such treaty provisions a foreign consul would have much the same power."

The power of the consul to bring suits and take positions in court is not to be considered as limited to the mere conservation of property or the collection of liquidated claims. Numerous decisions uphold his right to stand on a broader platform. The leading case of *Herman's Estate* (159 Minn., 274) affirmed the consul's right to file objections to a will. In *Szabo's Estate* (143 N. Y. S., 678) Surrogate Fowler, citing *Carpigniani* v. *Hall* (*supra*) wrote that he had no doubt as to the Austrian Consul's right to petition for the revocation of letters testamentary issued to another. This court, in *Hamilton* v. *Erie RR. Co.* (*supra*) while denying a consul's right to compromise a claim of his nationals in an action for negligently causing death, did not circumscribe the consul's activities on behalf of his nationals in a Surrogate's Court proceeding. In *Hunko* v. *Buffalo Crushed Stone Co.* (203 App. Div.,

284) a vice-consul was recognized as a proper person to file a claim for workmen's compensation where the widow of the deceased workman resided in and was a citizen of a foreign land (for a similar holding, as to a suit under an Employer's Liability statute, see *Ljubich* v. *Western Cooperage Co.*, 93 Ore. 633). Consuls have been found qualified to represent alien infants in accounting proceedings (*Matter of Bristow*, 63 Misc., 637; *Matter of Ostrowski*, 160 Misc., 482). No case has been found wherein there has been directly passed upon the right of a consul to make a formal election for his non-appearing national, but we see no reason why his broad powers should stop short of that. The bringing of or defense of a lawsuit, the enforcement of any claim or the filing of any sort of objection in Surrogate's Court, always involves the making of an election of one kind or another. Our courts will, as they did in *Hamilton* v. *Erie RR. Co.* (*supra*), protect the absent party against any assumption by a consul of power to give away, release or sacrifice the absent party's rightful claims, but no such adverse action by the consul-general is involved here. The situation here disclosed clearly calls for more than a mere collecting in for the widow of her legacy and the property set off to her under section 200 of the Surrogate's Court Act (to which exempt property the surrogate held the consul could make claim). The consul-general, we think, might well take his stand on the rule as stated by a company of recognized scholars in the Harvard Law School's "Research in International Law" (p. 278): "Inquiry, preliminary intervention and conservatory measures may not prove sufficient to protect the interest of an absent, minor or incompetent national of the sending state. In that case the consul is entitled by this paragraph to represent such national in proceedings before the courts or other authorities of the receiving state, initiating and defending actions and in general doing what the individual himself might do to defend his interests under the local law if he were present and competent. The consul must of course conform to the local law. While in representing his absent national he would be an attorney in fact, he could not appear as attorney in law unless a member of the bar of the court before which he acts (see Mexico, Law 1859, Art. 10, par. 2)."

The Legislature of this state, in a statute passed in 1936 and which applies only to estate smaller than this one, conferred upon consuls much more complete power and duties of representation than are here asserted by the consul-general. By that enactment (Surrogates Court Act, section 56-a) it is provided that when the gross estate is less than $2,000, or a non-resident alien's interest is worth less than $300, service of process on the alien may, by surrogate's order, be made on the nearest consul of the nation of which the alien is a national, and any and all other service on the alien, even by mailing, may be dispensed with. Service on the consul, says section 56-a, "shall be deemed personal service upon such alien within the state." When so served, the statute says, the consul "may appear and act on behalf of his national in the proceeding unless and until the national shall himself appear

either in person or by the other duly authorized representative." While Section 56-a cannot be applied in this estate, because of the amounts involved, it is at least an expression of public policy not at variance with the result we reach in this opinion.

Finally, we are confirmed in our view that this treaty makes the consul more than a mere conservator or protector of property by other articles of this 1931 Polish-American Treaty. Articles XX and XXII empower him to take appropriate steps toward such conservation and protection, but Articles XXII and XXIII go much farther (as does Article XXIV, which we are here construing) by according him the right to "act personally" in matters concerning claims for non-support of nonresident minor children against a father who is a resident alien, and the right to assert claims for workmen's compensation on behalf of his absent countrymen. On all the authorities and precedents, we conclude that this consul-general is, for present purposes, a personal agent of his national, charged with "doing what the individual himself might do to defend his interests under the local law if he were present and competent" (Harvard Research, *supra*).

The order of the Appellate Division and the degree of the Surrogate's Court, so far as appealed from, should be reversed, with costs in all courts to both parties payable out of the estate, and the matter remitted to the Surrogate's Court for further proceedings not inconsistent with this opinion.

LEHMAN, Ch.J. (dissenting) —Josef Zalewski died on September 17, 1940. In his will he bequeathed the sum of one hundred dollars to his wife Felicja Zalewski. Felicja Zalewski is a resident and national of the Republic of Poland. The will was admitted to probate and letters testamentary were issued to the executor named in the will. The Consul-General of the Republic of Poland executed, served upon the executor and filed an instrument stating: "I, Hon. Dr. Sylwester Gruszka, Consul-General of the Republic of Poland . . . acting on behalf of the surviving spouse of Joseph Zalewski, deceased, to wit, Felicia Zalewski, a resident of the Republic of Poland . . . do thereby exercise the personal right of election given the said Felicia Zalewski, pursuant to the provisions of section 18 and the Decedent Estate Law, and do hereby elect, on behalf of the said Felicia Zalewski, to take her share of the estate of the said decedent as in intestacy." Thereafter the executor brought proceedings to settle his account and the consul-general appeared and filed objections on behalf of the testator's spouse. His power to "exercise the personal right of election given the said Felicia Zalewski" was challenged and the courts below have sustained the challenge.

I concur in the opinion of Judge Desmond in so far as it holds that the "personal right of election" given to the surviving spouse of a testator by Section 18 of the Decedent's Estate Law is "personal" only "in the sense that an election must in each case be a conscious individually made choice

between the statutory provision and the testamentary provision." I assume, too, that authority to sign the notice of election may be delegated to an attorney in fact by the surviving spouse and that a power of attorney in general terms may sufficiently evidence an intention by a widow to "delegate the signing of the paper declaring her intention not to take under her husband's will," at least where it appears that the general power has been executed by the widow for the purpose of enabling the attorney in fact to assert the widow's personal right of election (*Matter of Celanza's Estate*, 308 Penn. St., 186). Nonetheless, there is no "conscious individually made choice" by a surviving spouse unless that choice is made by the spouse or by a person authorized to act in her behalf. The appellant asserts that the power to make that choice in behalf of a resident and national of the Republic of Poland has been conferred upon him as Consul-General by treaty between the United States and the Republic of Poland. The problem presented upon this appeal is whether it was the intention of the two sovereign states to confer upon the consular officers such power to act in behalf of their nonresident nationals.

The appellant relies upon Article XXIV of that treaty as quoted in the opinion of Judge Desmond. The only right or power expressly conferred by that section upon a consular officer is "the right to *appear* personally or by delegate in all matters concerning the administration and distribution of the state of a deceased person . . . for all such heirs or legatees in said estate . . . as may be nonresidents and nationals of the country represented by the said consular officer with the same effect as if he held their power of attorney to represent them. . . ." I agree that the words a treaty are not to be given a restricted technical construction which would impede the fulfillment of the purpose of the treaty.

The purpose of the section of the treaty upon which the appellant relies is clear. To protect the property interests of his nonresident nationals in an estate of a deceased person, a consular officer may "appear" and "represent" them in every form of judicial or administrative proceedings. No construction of the words "heirs or legatees in said estate" is reasonable if it excludes a person who under our law has a right to share in the estate under a will or as in intestacy. I cannot, however, find in the treaty any indication of a purpose to confer upon a consular officer power to exercise in behalf of a non-resident national a "personal election," i.e., a conscious, individually made choice between the statutory provision and the testamentary provision—nor do I think that by any process of liberal construction can the power to "appear" and "represent" heirs and legatees in the estate be stretched to include power to exercise such a choice for one of them.

In no cited case has a court sustained an assertion of power in consular officers to do more than act for the protection of rights granted to their nationals by law. The courts have drawn back whenever they were asked to sanction an exercise of any broader power by a consular officer. Thus, in

The Bello Corrunes (6 Wheat, 152, 168), the court said: "A Vice-Consul duly recognized by our Government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any Court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the Vice-Consul shall in any instance extend to the right to receive in his national character, the proceeds of property libelled and transferred into the registry of a Court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized."

Again, in *Matter of Herman's Estate* (159 Minn. 271), cited by Judge Desmond as a leading case, the court said "a consul may doubtless take appropriate measures for the protection of the property interests of the citizens of the country which he represents in cases where they have no other representative and are not present to act for themselves. But he acts merely in his official capacity as the representative of his government and not as the personal agent or representative of the parties in interest, unless he has been given special authority to act for and represent them (citing cases). His acts are provisional, and for the purpose of preserving the property and securing for his nationals an opportunity to assert and maintain their rights thereunder. . . . We have been cited to no case and we have found none, holding that a consul, simply by virtue of his office, has power to act for and represent individual claimants to property so as to foreclose their claims without special authority to do so."

The exercise of the personal right of election "requires the abandonment or destruction of an alternative right" (*Matter of Hills*, 264 N. Y., 349, 353). The statute which creates the right of election does not make its exercise subject to the approval of the court. It confers absolute freedom of choice on the surviving spouse of a testator. Many personal considerations usually influence that choice, and no person other than the surviving spouse can weigh these considerations. If a consular officer can exercise the "personal" right of election conferred upon a surviving spouse as if he had a power of attorney for that purpose he may destroy the alternative right which the spouse whom he represents might prefer and there is nothing in the statute or in the treaty which would empower a court to refuse to give effect to the choice so made though it might be patently unwise. In this case the bequest which is abandoned is small, and perhaps the choice made by the consular

officer may be wise and would be approved by the court. The Legislature has not, however, made the right to reject a testamentary provision depending upon its inadequacy, and if under the treaty that right may be exercised in behalf of a non-resident national by a consular officer, no restriction upon such exercise is expressed in the treaty or can be read into the treaty by fair implication.

The words "a consular officer . . . shall . . . have the right to *appear* . . . for all such heirs or legatees . . . as may be nonresidents and nationals of the country represented by the said consular officer *with the same effect as if he held their power of attorney*" are not fairly open to the construction that the consular officer may act for them in all matters as if he held their general power of attorney. He has the right to "appear" for them as if he held their power of attorney, and under the treaty he can exercise no other right. He may be authorized to act as their personal agent so far but no further. He may "assert or defend the rights of property of the individuals of his nation, in any court." He is not authorized to exercise for a national a personal choice to take an intestate share of the testator's estate in lieu of any provision made for the benefit of the national in the will.

Order should be affirmed.

LOUGHRAN, CONWAY and THACHER, JJ., concur with DESMOND, J.; LEHMAN, Ch.J., dissents in opinion in which RIPPEY and LEWIS, JJ., concur.

BOOK REVIEWS AND NOTES

International Law Conference, London, July 10–12, 1943. Ed. by W. R. Bisschop. London: published by the Editor, 1944 (?). Pp. viii, 184. Index. 15/–.

This conference was interesting not only because of the matters discussed but because of the number of eminent lawyers and publicists from many countries who were present. There were one hundred and twenty persons at the conference, among them lawyers, writers, and jurists from Belgium, Poland, Czechoslovakia, Russia, Germany, Norway, and the Netherlands, as well as the United States, and of course a goodly number of professors of international law and of members of the British Bar.

Four subjects were discussed:

1. "How far can military occupation, e.g., by the Axis Powers, create a valid title of acquisition of rights transferrable outside the occupied country and that of the occupant?,"
2. "Conditions and Methods of Recognition by new Governments,"
3. "The Settlement of International Disputes Including the Problem of Peaceful Change,"
4. "The Existence, Basis, Scope and Consequences of the Prohibition of War in International Law."

All of these questions are of course of immediate international interest. No very definite conclusions were reached on the prohibition of war and the problem of peaceful change.

As to these latter vital problems now confronting the nations, many of the difficulties so often debated since the League of Nations was first proposed were again gone over. All of the discussions were intelligent and on a high plane. This is especially true of the report of the Committee on The Existence, Basis, Scope, and Consequences of the Prohibition of War in International Law, of which Professor James L. Brierly of Oxford was the reporter.

Owing to lack of time, it was decided not to adopt any of the reports or resolutions offered on these matters, but to adjourn the two subjects to a future meeting, which it was hoped might be held in 1944. So far no such second meeting has been held, but I am confident that if one should now be held under the able direction of Sir Cecil Hurst, than whom no one is better versed in the problems of international relations and law, it would be of value at the present moment in clarifying some of the postwar problems, so urgently calling for intelligent action by the nations.

FREDERIC R. COUDERT

Digest of International Law. By Green Haywood Hackworth, Legal Adviser of the Department of State. Vols. V, VI, VII, and VIII. Department of State Publications Nos. 1927, 1961, 1998, 2100. Washington: Government Printing Office, 1943–1944. Pp. v, 851; iv, 655; v, 709; ii, 384. Index volume. $2.50; $1.50; $1.75; $1.50.

These final volumes of Mr. Hackworth's Digest maintain the high standard set by the earlier volumes. They make available to the reader the position of the Government of the United States upon the subjects discussed, against a background of actual cases and problems arising over a period extending approximately from the beginning of the century to the entrance of the United States into World War II. It is gratifying to be able to record that the Digest reflects not only official acts and opinions but that constant reference is made to unofficial sources such as to articles in this JOURNAL and to the work of the Harvard Research of which the author was an active and valued member.

Volume V: This comprises Chapter XVI, on Treaties (pp. 1–433); Chapter XVIII, on State Responsibility and International Claims (pp. 471–851); and a short intervening chapter of about 30 pages entitled "Hemispheric Security." It might have been better to find another place for this brief intermezzo, now placed between two such weighty compositions, although it cannot be denied that our relations with our neighbors to the South furnish many precedents for the questions discussed in the other two chapters. The Digest adopts the implied definition of treaties contained in the Constitution of the United States. The author maintains that, as there used, treaties include "any international agreement, regardless of the terminology by which it is described, if it is of such a nature as to require the advice and consent of the Senate to ratification by the President" (p. 1). This leaves open the more important question as to what agreements actually do require such advice and consent and some would say it puts the cart before the horse. It is indeed one of the most important constitutional questions now affecting our foreign relations. The subject is dealt with under the heading of "Executive Agreements." The author has collated a large number of such agreements made pursuant to authority contained in acts of Congress, as well as agreements entered into without specific legislative authorization. His material shows that the question of the power to make such agreements has been a subject of consideration by the Department on frequent occasions, especially during the last half century, with varying attitudes taken under different administrations. Thus a manuscript letter of Secretary Knox to the Mexican Ambassador in 1910 is illuminating. It raises doubt as to the validity of an executive agreement which by its nature should have, he believes, been submitted to the Senate (p. 399). Chief Justice Marshall pointed out that the precise boundary of a delegation of legislative power to the President is a subject of "delicate and difficult inquiry into which a court will not enter unnecessarily" (p. 392). The author presents a large

number of precedents now of special interest because of proposals for a Constitutional amendment of the clause requiring a two-thirds vote of approval by the Senate.

In the chapter relating to International Claims, the author deals with the general criterion of responsibility to aliens, giving not only examples of claims submitted by or against the United States but also decisions of international tribunals such as the World Court, in cases in which the United States was not a party. Principles of responsibility based upon a denial of justice defy precise definition. In an article in this JOURNAL—Vol. 4 (1910), p. 787—Judge John Bassett Moore observed that he did not consider it to be practicable to "lay down in advance precise and unyielding formulas by which the question of a denial of justice may in every instance be determined." The author refers to the Neer Case before the Mexican General Claims Commission, in which this statement is quoted, and other examples which show that the principles of international responsibility based upon a denial of justice as in so many other instances of state responsibility, eludé precise definition. The improvement of judicial processes is therefore of the greatest importance in this matter.

The author discusses state responsibility arising by reason of contract, the acts of private persons, the acts of insurgents or revolutionists, and the acts of regular forces and also deals with the questions of damages and the distribution of indemnities. This excellent chapter closes with a digest of cases relating to the requirement that the right to protect is confined to nationals of the protecting state, a rule which has created many *lacunae* in the redress of international wrongs and may be subject to some modification in days to come.

Volume VI: This volume is devoted to modes of redress. Chapter XIX (pp. 1–151) deals with Amicable Modes of Redress and other measures short of war; the balance of the volume (Chapters XX and XXI, pp. 161–638) to War. The author gives many enlightening examples of amicable redress even where the United States has not been a party to such agreements. The provisions of the League of Nations Covenant are discussed together with supplementary action taken by the organs of the League. In the chapters relating to war the author deals with the commencement of war and belligerent measures on land, on sea and in the air.

Volume VII: This volume comprises three closely interrelated subjects, Interference with Neutral Commerce (Chap. XXII, pp. 1–166), Prize (Chap. XXIII, pp. 175–330), and Neutrality (Chap. XXIV, pp. 343–693). It draws its material from the rich sources of World War I and also contains references to diplomatic notes, exchanges of conversations, and instructions to envoys relating to interferences with the commerce of the United States by belligerents prior to our entry into the present war. References are particularly frequent to circulars issued by the Department of State and to British Orders in Council with various modifications and interpretations. Interference

with neutral commerce during periods of civil strife are also dealt with, particularly interesting being the brief discussion of the right of the insurgents represented by the party of General Franco to blockade loyalist ports during the civil strife in Spain in 1936 (pp. 171–173). Most notable in the chapter relating to Prize are references to the issuance of navicerts (pp. 212–217), a practice which has been widely followed in the present struggle. The author has made frequent references to the labors of the Harvard Research in International Law and its Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War. The use of neutral territory and the duties of neutrals toward belligerent vessels and aircraft within their territory form the subject of a discussion based upon examples taken principally from World War I, and to some extent also from precedents growing out of seizures within our ports of German and Italian merchant vessels prior to our entry into the present war (pp. 520–529). The chapter closes with a treatment of neutrality under the League of Nations Covenant. The author raises the question of the influence of a breach of a treaty to maintain peace or of a non-aggression pact upon the right to enjoy the privileges of non-intervention by states which would otherwise be neutral. This question was raised both in the British Parliament in connection with the interpretation of the Kellogg Pact and before the International Law Association. While there is no authoritative settlement of the question it is one which will undoubtedly play an important role in future machinery and practice for the maintenance of peace.

Volume VIII: This is the General Index of the set.

Mr. Hackworth is to be highly commended for bringing his work to a timely and successful completion during the progress of a devastating war, when he and his assistants must have been continuously engrossed in other matters. That they have been permitted and encouraged to do this by the Department may be taken as proof, if that were necessary, that our Government wishes to emphasize at this critical moment the supreme significance of law and of legal processes in the regulation of its relations with the rest of the world.

ARTHUR K. KUHN

Justice and World Society. By Laurence Stapleton. Chapel Hill: University of North Carolina Press, 1944. Pp. viii, 150. Index. $2.00.

This book attempts to solve no less a problem than the eternal question: What is justice? Miss Stapleton identifies justice with the law of nature. She is an enthusiastic follower of the natural-law doctrine. She considers "historicism" to be opposed to that doctrine and as one of the deep roots of Nazi-Fascist ideology. Consequently, her answer to the fundamental question is: Justice is democracy.

According to Miss Stapleton the idea of justice refers to government, not to law. That only a democratic government can be just, Miss Stapleton tries to prove, in the main, as follows. She maintains that justice is, by its

very nature, real, intelligible, and universal. From the fact that justice is intelligible she deduces "the element of consent," which means that a just government is one based on the consent of the governed. The statement that justice is intelligible is an unproved and unprovable presupposition. Outstanding philosophers, for instance Plato, base their natural law doctrine on an opposite hypothesis. But even if we accept Miss Stapleton's supposition we cannot admit that the "element of consent" is a consequence of the intelligibleness (or rationality) of justice. Only by self-deception can we deduce from the postulate that rules regulating human behavior are intelligible, that is to say, capable of being understood by the individuals whose behavior they regulate, the other postulate that these rules must be created with the consent of the individuals concerned. By no logical-deductive method can it be proved that law established in an autocratic way cannot be, and that only law created in a democratic way, *i.e.* with the consent of the subjects, can be, intelligible. By "consent" Miss Stapleton understands "consent by a majority" but she is not in a position to deduce the principle of the majority vote, an essential element of democracy, from rationality as an element of justice.

The logical-deductive method of natural-law doctrine proves nothing since it enables its followers to "prove" everything. In applying this method Plato has "proved" that democracy is incompatible with the idea of justice and that the only just government is an autocratic one. Miss Stapleton's opposite thesis, that democratic government is nearer to just government than any alternative that might be proposed, can be justified only on the hypothesis that individual freedom is the highest value. This hypothesis, as a judgment of value, is entirely subjective in character since it is based on the emotional, not on the rational, component of our consciousness. We can believe in values and fight for values, but we cannot prove the objective truth or universal validity of a value judgment.

On "world society" the book says only that "the general concept of justice . . . is connected with the idea of a greater society to which all belong," that "the absolute prerequisite of further advance towards the establishment of justice is the founding of an organization of nations which transcends national, regional, and racial barriers," that we are led "to look for a type of association which will be consistent with government by consent and yet coherent enough to take real decisions," and, finally, that "the demand for an international organization to be backed up by force is an admission that principles require action."

HANS KELSEN

American Diplomacy in Action: A Series of Case Studies. By Richard W. Van Alstyne. Stanford, Cal.: Stanford University Press, 1944. Pp. 760. $5.00.

This book is a very readable and useful contribution to the current literature on the subject of American foreign policy, but it is really not as revolutionary in approach or in effect as the title suggests. Professor Graham H.

Stuart in his foreword states that "it is foreign policy subjected to laboratory treatment," and the author says in his introduction that he tries "literally to get down to cases." Specific instances and illustrations "mobilized and classified," he goes on to say (page 4) "help to establish a point. They garb a policy or a principle with meaning and suggest a conclusion or a certain line of action." This is a very intriguing and provocative beginning. The reader prepares himself for a totally novel treatment and wonders whether at last a satisfactory case method for the teaching of history and political science has been devised. This reviewer, for one, however, was disappointed; perhaps he expected far too much, but as he read along he found himself enjoying a series of essays on the history of American foreign relations and not a collection of "cases" as he conceives "cases." There was no disappointment in the quality of the material nor in the style of writing. Both are splendid. Professor Van Alstyne has written a lucid and conveniently arranged series of discussions on important phases of American diplomatic history, but, in the eyes of this reviewer, it remains a "history," not a "case" book.

The unconventional element in the approach lies in the partial abandonment of the traditional chronological arrangement, and in the selective nature of the topics treated. The book is divided into three main sections, "Part I: Security and the Monroe Doctrine," "Part II: Expansion and the Concept of Manifest Destiny," and "Part III: Neutrality and Isolation." Each of these sections is further subdivided into chapters (arranged topically and chronologically), which deal with particular phases of the main problem under examination. Part I, for example, which occupies more than half the book, begins with a group of chapters dealing with continental security, goes on to treat of Isthmian and Caribbean security, hemispheric security, and collective security, and concludes with a series of chapters on "Freedom of the Seas."

Part II (Expansion) begins with a chapter on the "Spanish Floridas, 1804–1814," and takes up Texas, Oregon, the Mexican War, and the opening of China and Japan, among other matters, including Cuba, Panama, Samoa and Hawaii. In Part III (Neutrality) comes the closest approach to a genuine case study. The chapters in this section are, on the whole, shorter than others in the volume, and are limited to very specific episodes such as "The Case of Citizen Genet, 1793" (chapter 45), "The Trent Affair, 1861" (chapter 49), and "Neutral Rights: The American Civil War" (chapter 52), and "Neutral Rights: The World War of 1914–1918" (chapter 53). For each of the three main parts there is an introduction which treats the problem in the large in highly skillful fashion.

This reviewer's misgivings as to whether the volume constitutes a real case study should not detract from the value of this work as "history." Some of the chapters are masterpieces of concise analysis and Chapter 22 ("The World War of 1914–1918") is about the best brief account of why this nation went to war in 1917 that this reviewer has seen.

The interesting problem remains, however, as to whether these chapters are truly "cases." In a law course or a business school course a "case" is a precedent usually regarded as binding, or a set of facts which challenges the student to make a conclusion and which, as Professor Van Alstyne says, "suggest . . . a certain line of action" for the future. No line of action emerges from these chapters as Professor Van Alstyne has written them other than what is found in any good history: the so-called "lessons of history" are there to see but they are not shaped in "case" form. It takes more than a new arrangement of topics and a departure from strict chronology to make a "case" book. The facts in each chapter are so tied to a particular time and set of circumstances that they fail to provide a general guide to conduct for new diplomatic situations.

This may be quibbling. It is not for this reviewer to be dogmatic as to what a "case" is or should be. He is merely registering his opinion that Professor Van Alstyne has given us a refreshing and stimulating study of diplomatic history, but has not provided a "case" book in the usual sense of that term. If he had not attempted to label his product in this unorthodox fashion no misunderstanding would have arisen.

PAYSON S. WILD

While America Slept. By D. F. Fleming. New York: Abingdon-Cokesbury Press, 1944. Pp. 269. $2.00.

This book is a compilation of radio talks delivered by Dr. Fleming between May, 1940, and December, 1941. It is, therefore, a running but consistent commentary on events that occurred during the year and a half before America entered into the war. Dr. Fleming's knowledge of history and international relations is reflected in almost every sentence. The series of talks, when viewed as a whole as we can view them now in a book form, constitutes a unity which is unexpected before one commences to read the book. In other words, Dr. Fleming never fails to put his own theory into the interpretation of the events that occurred. He never fails to be enlightening, and, despite the fact that he remains always consistent with his own outlook, he is never unfair. One striking feature of the book which contributes greatly to making it worth while is the historical paragraphs covering the events—which incidentally prove that all in America did not sleep during these epoch-making weeks—as they occurred between the weekly broadcasts. The book therefore serves a dual purpose in that it combines the history with the discussion of the international relations and the historical events that inspired each week's discussion. The book reflects the best use of the radio from an educational and public discussion standpoint. It also reflects the best element of the American principle of freedom of speech and freedom of the press and the thoughtful reader cannot help but draw the deduction that with such discussions going out over the ether waves and thousands of people listening to them, if there is anything in the force of public opinion, it should redound for the benefit of all people. A trained citizenry, acting after study

and due consideration of a problem, does constitute the most idealistic phase of a democracy. Dr. Fleming proves himself a worthy leader in the production of a trained citizenry. The American who reads this book cannot avoid the acceptance of the thesis that democracy in America not only functions but that it works. As the material in the book was written for broadcasting its news value was always stressed. Old newspapers and old news reports are generally lacking in interest but these broadcasts are not. In other words the historian as well as the newswriter must have been working at the same time. Dr. Fleming has shown himself to be both a historian and an exceptional newswriter.

ELBERT D. THOMAS

The League to Enforce Peace. By Ruhl J. Bartlett. Chapel Hill: The University of North Carolina Press, 1944. Pp. 214. Appendices. Index. $2.50.

Every American of voting age should read this short history of the idea, the organization, the work, and the fate of the League to Enforce Peace. The organization was started early in 1915 by leaders in the peace movement and others, largely leading Republicans, who were moved by the outbreak of the war in Europe to forsake the emphasis long placed by American peace societies on arbitration and disarmament as the sole way to security against war, and to support what was, indeed, the program of the earliest writers on the maintenance of peace, namely a league of nations prepared to use force against any member refusing to submit a dispute to peaceful settlement. Under the presidency of ex-President Taft, the organization, from its founding through the drafting of the Covenant at Paris, worked with all conceivable devotion and efficiency to spread the idea of such a league. President Wilson had endorsed it on May 27, 1916, and continued to do so. Senator Lodge had endorsed it also—for a time. After the adoption at Paris of the final text of the Covenant—which embodied suggestions made by Taft, Elihu Root, A. Lawrence Lowell, and others, all accepted by President Wilson and, on his request, by the Peace Conference,—the League to Enforce Peace exerted every effort to secure the entrance of the United States into the League of Nations. In this it had the support and coöperation of many of the most important organizations and leaders of opinion in the country. It had also many important opponents, but Mr. Root, who was opposed to the ratification of the Covenant at that time, in any case, wrote in July, 1919, that the great majority of the American people wanted the treaty ratified "at once." As proof of this we have the fact that the Senate itself gave to the Covenant a large majority. Mr. Bartlett agrees with other authorities, as well as with the great mass of the public, that its failure to secure the necessary two thirds was due to Senator Lodge and his technique of smothering the treaty by amendments, a technique already perfected by him in the slaughter of several arbitration treaties. Whatever doubt may

have remained as to the Senator's motives after his own book "The Senate and the League of Nations," published in 1925, has been answered surely by the copious quotations and citations given by Mr. Bartlett, several from letters from Lodge to Root. So little did Lodge possess of political foresight that, in his effort through defeat of the League of Nations to defeat Wilson and the Democratic Party, he apparently never saw that the ultimate casualty would be peace itself.

The importance to us today of the story unfolded by Mr. Bartlett lies in his account of the bewilderment sown by Lodge's tactics among the pro-League Republicans. Party ties and personal friendships blinded the political acumen of many of the ablest intellectual leaders of our time. One climax was reached when, trusting to the sincerity of Lodge as a "friend" of the League of Nations, Taft and the majority of the executive committee of the League to Enforce Peace, in desperation finally voted to accept the Lodge reservations, although Taft himself had declared that Article 10 was the heart of the League. The second climax came when the thirty-one Republicans, among them many of the officers of the League to Enforce Peace, signed the statement, drafted by Root, that the best way to advance the cause of international coöperation was to elect Harding.

It is on the confusion of thinking of these men, leaders of the League to Enforce Peace, ardent supporters of the League of Nations, and on their extraordinary shifts of position, that the book throws a special light and thus supplements the very able presentation of the struggle in the Senate by Denna F. Fleming in "The United States and the League of Nations." Mr. Bartlett has based his study on several very important collections of unpublished documents. In addition he enjoyed many conversations with President Lowell, who was chairman of the executive committee of the League to Enforce Peace, with Hamilton Holt, the initiator of the organization, and with Theodore Marburg who was, throughout, one of the chief leaders and is still active in the cause.

SARAH WAMBAUGH

An Adventure in World Order. By Philip C. Nash. Boston: The Beacon Press, 1944. Pp. 139. $1.50.

The Dumbarton Oaks Conference, engaged in spadework on possible outlines of the future international organization, could do a lot worse (and probably will) than use this clear and common sense blueprint by Dr. Nash as a basis of discussion. After a brief introduction Dr. Nash presents a draft *Constitution of the United Nations of the World* consisting of twenty-one articles. The legislative, executive, and judicial machinery of world government is detailed. Each article is accompanied by a brief explanation of its terms, importance, and the author's supporting arguments.

This Constitution weaves a new pattern out of the League Covenant and the Moscow and Teheran Declarations and fashions these dubious props into

the beginnings of a federal world government. The old League Assembly becomes a legislative body with the nations represented according to population. Top limit of twenty delegates is assigned to China, India, Great Britain, Russia and the United States. These delegates are to be elected by geographical districts although otherwise the methods of election are left to the nations. In place of the old League Council whose functions were partly legislative and partly executive Dr. Nash proposes a regular bicameral structure. In the Council, as in the United States Senate, the nations are to have equal representation with one delegate appointed by each of the national governments. An Executive Board of eight members, elected by the Assembly and Council, is to perform the executive functions.

The absolute necessity of endowing the world government with power to tax, instead of being, like the League, an abject pensioner of its members, is emphasized by Dr. Nash. In a neat compromise he suggests that members of the United Nations Assembly be paid by its Treasury while members of the Council remain on the payroll of the national governments appointing them. The Permanent Court of International Justice is retained but endowed with compulsory jurisdiction in all legal disputes.

Dr. Nash provides for an International Police Force, largely a militarized air force, but he says frankly that it would be ineffective if challenged by a great power. He hopes that national governments will have learned the need of uniting against aggression and will decide to support the International Force with national military contingents. He suggests obligatory economic sanctions as the first line of defense against aggression.

It is unfortunate that Dr. Nash does not follow through with the federal principle in the all-important question of enforcement of international law but accepts as inevitable the operation of international enforcement on the largest member unit—the nation. When enforcement promises to be the crucial issue on which the ship of peace may founder again it is tragic that so few of those concerned with the problem are aware of the simple solution worked out by the United States Constitutional Convention in 1787. It was concluded then, and every federation has demonstrated the point since that time, that the only safe and effective enforcement for any community—local, state, national or international—is that which operates not on state or nation but directly on the individual violator of law whoever he is and wherever he may be.

EDITH WYNNER

Future Policy, Program, and Status of the International Labor Organization. Montreal: International Labor Office, 1944. Pp. vii, 194. $1.00.

Official Bulletin of the International Labor Office. Vol. XXVI, No. 1 (June 1, 1944). Montreal: International Labor Office, 1944. Pp. ii, 121.

The first Report prepared by the International Labor Office entitled *Future Policy, Program and Status of the International Labor Organization,*

for the twenty-sixth International Labor Conference, represents the thinking of the secretariat of the Organization on the subjects indicated. It was prepared to serve as a basis for discussion of the first item on the agenda of the Conference, which was similarly entitled. Although the Conference did not take action on all the problems suggested in this 194-page Report, the document stands as a carefully developed outline of problems facing the ILO. The *Official Bulletin* for June 1, on the other hand, presents the decisions of the Conference in the official texts of the Recommendations and resolutions adopted. It is not confined to the conclusions reached on the first item of the agenda, but includes as well action taken on recommendations to the United Nations for present and postwar social policy, the organization of employment in the transition from war to peace, social security, and minimum standards of social policy in dependent territories.

Since four of its six chapters are concerned with the operating problems of an international organization, Report I is of special interest to readers of this JOURNAL. Chapter II presents a discussion of the rôle of the ILO in relation to other international bodies, and Chapter IV a discussion of the development of the machinery and procedures of the Organization. Chapter V is concerned with the constitutional practices of the Organization and Chapter VI with the financial relations of the ILO with the League. Chapter III outlines some suggestions for the future program of the ILO, but does little more than this, and the chapter serves primarily as an indication of the possible scope and direction of future activities.

Among the more important decisions of the twenty-sixth International Labor Conference was a new declaration of aims and purposes of the Organization, which was adopted with a view to modernizing the original statement found in Section XIII of the Treaty of Versailles. A discussion of the text proposed by the Office will be found in Chapter I of Report I. This text was adopted with minor modifications and appears in the *Official Bulletin*. Attention is especially directed to this declaration, which has become known as the Philadelphia Charter or the Declaration of Philadelphia. It sets forth the faith of the members in the ILO and their conception of the rôle it must play in the future. The President of the United States has stated that this Charter summed up the aspirations of an epoch which has known two world wars and that future generations will look back on it as a landmark in world thinking.

The *Official Bulletin*, in presenting the texts of the seven Recommendations and twenty-three resolutions adopted by the Conference, is a meaty document of 121 pages. The Recommendations, which the members are required by the constitution of the Organization to bring before the authorities within whose competence the matter lies, for the enactment of legislation or other action, deal with the following subjects: income security, social security, medical care, social policy in dependent territories, employment, employment service and public works. The resolutions cover too wide a

field for summarization here, but attention is directed especially to resolution 1 concerning the social provisions of the peace settlement and resolution 6 concerning the economic policies for the attainment of social objectives. The *Official Bulletin* is no dry-as-dust official publication, for it contains plans and ideas in the field of international labor problems carefully formulated by technicians, government leaders, workers and employers from all over the world. It is a vital document, presenting a blueprint of social and economic developments of the future.

Both of these volumes should be on the desk of every social scientist, not only for reference, but for careful study.

OTIS E. MULLIKEN

Makers of Modern Strategy: Military Thought from Machiavelli to Hitler. Edited by Edward Mead Earle, with the collaboration of Gordon A. Craig and Felix Gilbert. Princeton: Princeton University Press, 1943. Pp. xxii, 553. Bibliographical notes. Index. $3.75.

Political scientists generally, and international lawyers in particular, have long considered the problem of the control or eradication of war to be their own special province. But thus far most peace planners have sought to prescribe cures without troubling to study the disease. The result has been a long list of proposed remedies which have been utterly fantastic in view of the realities of war.

For some strange reason scholars have relinquished the whole challenging field of military studies almost entirely to the professional soldier, who is either not equipped to pursue it on the level of broad analysis or is not especially interested. The soldier is a craftsman, generally intent on solving his immediate strategic and especially tactical problems. The broader aspects of strategy and the pervasive reciprocal relationship between strategy and the political, social, and economic aspects of our civilization do not interest him more than they do anyone else. The intellectual problems presented seem to him to have little specific application to his art. The result has been that this whole field, which is worthy of the keenest application of our best minds, has been almost wholly neglected.

Were it only for its subject matter alone the publication of this book would therefore be a notable event in the field of social science for it would demonstrate that at long last the history of military thought was receiving the respectful attention of distinguished scholars. Yet it is far from being a mere exploratory venture into a hitherto unexploited field. As a contribution of considerable magnitude to military history this book is bound to remain for a long time, if not permanently, the standard interpretative work for the period which it covers.

Though a symposium is bound inevitably to be somewhat uneven in quality, this one is outstanding for the very high level of distinction achieved at the outset and more or less maintained throughout. That in itself is a

remarkable testimonial to the competence and effort of the editor and his collaborators. The editor, incidentally, has long been the acknowledged leader of the few political scientists and historians in this country who have interested themselves primarily in military studies, and he is the author of three excellent chapters out of the total of twenty-one (including the "Epilogue") contained in this book.

The book sets out to record, appraise, and interpret the ideas not necessarily of those who have been the most original thinkers and executors of military ideas but rather of those who have "bequeathed to posterity a coherent statement of strategical doctrine." Since the makers of modern strategy are not necessarily the writers thereof, and since great military leaders have usually left in their correspondence and official memoranda a body of material from which a "coherent statement of strategical doctrine" can be derived, it is fortunate that this orientation is not too rigidly maintained. Yet as it is, the emphasis is definitely on the publicists—from Machiavelli to Seversky. But this fact, if it is a shortcoming, is more than offset by the originality and imagination which resulted in the inclusion of many civilian figures like Adam Smith, Alexander Hamilton, Friedrich List, Delbrück, Churchill, Lloyd George and others, who would have been excluded in a more conventional approach.

Only relatively limited treatment is given to theories of sea war, which is rather regrettable, especially since the editor and contributors are citizens of the country which has now become the premier sea power of the world. There is a long and competent chapter on Mahan by Margaret Sprout, and a brilliant interpretation of "Continental Doctrines of Sea Power" by Theodore Ropp. But the vast body of English thought which Mahan after all only elaborated and popularized is wholly neglected. Moreover, the third of the three chapters on sea power is devoted to an analysis of Japanese naval strategy which because of its many inaccuracies and misconceptions is of very dubious value and in this reviewer's opinion unworthy its company in the book.

The even more limited treatment of theories of air power is much more understandable, due to the paucity of sound and penetrating writings on the subject which have thus far appeared. The single chapter on air power, by Edward Warner, presents a critical analysis of the writings of Douhet, Mitchell, and Seversky. It is excellent as far as it goes, but this reviewer wishes that Mr. Warner had been given more space, even at the cost of condensing some of the other chapters in this excellent and even epoch-making book.

BERNARD BRODIE

The Geography of Peace. By Nicholas J. Spykman. New York: Harcourt, Brace, 1944. Pp. xii, 66. Maps. $2.75.

The Geography of Peace by the late Professor Nicholas John Spykman is an analysis of the global position of the United States, and its responsibilities

in establishing and maintaining an enduring peace after the War. The author carefully points out the broader geographic relationships of continents to continents and in so doing revises the principles of geopolitics as set forth first by Mackinder. The German school of Geopolitics under Haushofer distorted and exploited those principles to support the Nazi ideology and later its war machine.

That the distribution of the continents, the ocean fronts, the sea margins, the peninsular forms and the relief features of every continent exert a strong influence on our ability to wage war, and indeed on the type of war we wage, is plainly shown in World War II. Thus when political pressure is exerted on three sides of any nation by a strong aggressor, that nation must yield, as in the cases of Austria, Czechoslovakia, and Poland. Moreover, such geographic factors as climate, mineral resources (especially power minerals), usable land, navigable waterways, and forests, bestow upon a State an ability to develop a "power Potential" within the state. A state with a power potential can wage war but by its use of the same power it can likewise establish the peace.

One by one the commonly used conic, azimuthal, and hemispherical map projections are discussed and eliminated because they either do not show (1) all of the earth and the relationship of each nation to each other nation, (2) the correct area so that proper distributions can be studied on a global scale, or (3) correct directions and distances. Obviously all such properties are found only on the globe but Miller's modified Mercator Projection is selected by the author as the best to show global relationships. On the principle that when dealing with problems of safety and independence any nation has to act on the basis of the strength it can mobilize either within its own territory or through its allies and protectors, three great nations stand out in the three great continents in the Northern hemisphere—the United States in North America, Great Britain in Europe, and Russia in Asia.

While Dr. Spykman's book is only a broad outline for any plan for peace, attention to details and the development of a methodology which harmonizes with the background material contained in the book would assure us of a peace with some foundation in fact. This book should be widely studied, especially by those persons charged with responsibility, however minor, for establishing the conditions of peace at the close of this war.

R. B. FROST

Democratic Ideals and Reality. By Sir Halford J. Mackinder. Henry Holt, 1942 (reissued). Foreword by Major George Fielding Eliot and Introduction by Edward Meade Earle. Pp. xxvii, 219. Index. $1.90.

As a classic statement of a fundamental geopolitical theory this volume, first published in England in 1919, has already demonstrated certain qualities of timelessness. Written in the weeks immediately succeeding the armistice in 1918, it represented years of work and reflection in the various fields of

geography. The book was intended as a warning to Allied statesmen and people; Mackinder tried to interpret basic world political antagonisms, and to point out the danger spots to his compatriots. His most attentive audience, however, was found not in Britain but in Germany, and after the peace settlement. In Mackinder's argument that the Power which controlled the "Heartland" of Eurasia would control that "World-Island" and, perhaps, the world, Dr. Karl Haushofer and his cohorts of the "Geopolilik" school found grist for their mill. The careful reader of the works of Mackinder and the Germans will find many examples of the fashion in which the latter twisted the British scholar's thesis around to suit their political ends. At the time of the reissue of this volume the significance of the argument was again emphasized, but in a different vein. The struggle between the two great "land-powers," Germany and Soviet Russia, was approaching its flaming climax; the great "sea-powers," Britain and the United States, were not yet in a position to influence decisively the outcome of the combat. In the detailed geographical and historical analysis of the potential of the "Heartland," observers and formulators of both military and political strategy could find much food for thought. Today, finally, as the climactic stages of the contest between the "sea-powers" and one reeling "land-power" are reached, this book is of even greater importance. Parts of Mackinder's thesis have been validated. The "land-power" which held the "Heartland" and mobilized a loyal manpower within it, has been victorious. The fundamental questions posed by the author in 1919—"who shall control the 'Heartland' and how will it be confined?," and "how shall relations between the Western 'sea-powers' and the 'land-power' of Eurasia be adjusted?," are once more foremost on the agenda.

It is as a geopolitical primer of peacemaking that this volume deserves to be reread and studied in 1944; the fact that one reading it today can, with the wisdom of hindsight, find flaws in the reasoning does not detract from its value as a thought stimulant. It seems to this reviewer that the fundamental patterns of geographic power-relationships laid down by Mackinder are still sound. The chief modifications which are demanded in the theory are the result of technological changes which have occurred in the world since 1919, indeed, since 1939. The emergence of air power, above all the narrowing of the "World Ocean" between the Western Hemisphere and the "World-Island," are the two major factors which have tempered some conclusions which were valid twenty-five years ago.

Any reader of Mackinder owes it to himself to go further. The aged author restated his thesis, with appropriate modifications, in *Foreign Affairs* in July, 1943; his ideas have been subjected to critical scrutiny by several recent writers, notably the late Nicholas John Spykman. Anyone who is still unclear about the difference between "geopolitics" and "Geopolitik" should steep himself in Mackinder as a pioneer in the former field; to any individual attempting to trace a clear path of thought through the maze of

post-war problems, this prophetic book may be a guide, surely will be provocative.

WILLIAM G. FLETCHER

Geopolitics, The New German Science. By Andrew Gyorgy. Berkeley: University of California Press, 1944. Pp. vii, 141–303. Bibliography Index. $1.50.

The author of this compact study proposes to examine the origin, nature, development, and validity of the pseudo-science which burst upon the consciousness of the world in recent years under the name Geopolitics. He has succeeded. In 158 pages he subjects the German hybrid synthesis of geography and national policy to a criticism which is historical and analytical in form and well documented in the material selected from antiquity, from the Middle Ages, and from moderns of the Kjellén, Ratzell, and Haushofer schools. He very correctly concludes that the German *Geopolitik* contained nothing really revolutionary but represents a deliberate and tendentious combination of old ideas already widely prevalent in previous geographical and political thought but violently and unscientifically distorted to the special war purposes of the Nazi state, particularly to its program of world domination. Funnelled to the German Staff by Haushofer, who was both geographer and military expert, it served as an important medium of education for conquest. The present essay, with its commendable attention to accuracy of citation, with abundant footnotes that are frequently as valuable as the text, and with a bibliography that emphasizes the primary sources, is not for the casual reader but for the student of political science and of global geography as related to foreign policy.

Not as comprehensive or searching as some previous criticisms, such as Mattern's *Geopolitik, Doctrine of National Self-sufficiency and Empire*, Dorpalen's *The World of General Haushofer*, or Whittlesey's *German Strategy of World Conquest*, Gyorgy's synthesis is more concerned with the continuity of the stages in the evolution of Geopolitics and in the degeneration of Haushofer's scientific mind than in fullness of narrative such as James Brown Scott would bring to bear on the evolution of a phase in international law. The present treatise is closely written and assumes that the reader is familiar with technical terminology. There are several schematic charts illustrating the integration of geopolitical education in the Reich with the other propaganda agencies of the German state under Hitler.

Students of international law will welcome Gyorgy's brief but timely exposition of *Geojurisprudenz*, that is, the new Germanic contention that the claims of *Lebensraum* must supplant the old "spaceless universalism" of previous doctrines which upheld an all-inclusive and objective law of international obligation. The Nazi jurisconsults will have no more of the narrow doctrine of natural right to space and autonomy for all nations, since such hypocrisy, in the book of Nazi legalism, is regarded as only a

form of propaganda for a disguised imperialism. The universal *jus gentium* must give way to a "spatially purified" international law which will be based on ethnic factors, biological vitality, blood relationship, and geographic considerations. The Law of Nations will be determined, moreover, by a limited group of powerful states on a regional basis. State equality is a myth, and the observance of international treaties by large and small states alike is unintelligible because irrational. The old concept of a unified, codified law applicable to all peoples must yield to regional power hegemony as the legalizing principle of inter-statal relations. This new legal order of German invention has already been treated in this JOURNAL (Vol. 34 (1940), pp. 588–600). As developed by Carl Schmitt, Keller, Langhans-Ratzeburg, Langen, and other spokesmen of geographical legality, it simply means power politics, naked force, and the ethics of the jungle. The new Germanic concept of justice was expressed by Frank, Nazi Minister of Justice at the Congress of German Jurists, held at Leipzig, on October 2–4, 1935:

> "Recht ist was dem deutschen Volk nützt und Unrecht was ihm schadet." (Justice is whatever benefits the German people and injustice whatever harms them.)

Geopolitics in its turn, taken together with its subsidiary disciplines, emerges as a geographic rationalization of international conflict. It would substitute Machiavelli for De Vitoria and Grotius.

EDMUND A. WALSH

Russia and the Peace. By Sir Bernard Pares. New York: Macmillan, 1944. Pp. xi, 293. $2.50.

Russia and the Peace is an informal and rambling discussion of a variety of topics ranging from communism, religion, the question of nationalities, patriotism, emigration, Siberia, and the organization of Slavonic studies in the English-speaking world, to cursory surveys of Russian relations with Poland, Finland, Ukraine, the Balkan countries, the Near and the Far East, Germany, England, and the United States. Some of the material included in this volume has already appeared in the *New York Herald-Tribune*, the *New Republic*, and *Foreign Affairs*. Although Sir Bernard claims, in the chapter dealing with Finland, that his analysis is not offered "as a justification of Russian policy and action," the nature of his argument and the highly selective character of the historical evidence he produces are such as not to give offense to the most ardent supporters of the Soviet régime. This attitude of the eminent British author, who only a few years ago was among the Soviets' most uncompromising critics, has been probably influenced by "the great wave of enthusiasm" for Russia "which went right through Britain" after Hitler's invasion of the U.S.S.R. Since, however, as Sir Bernard puts it, "the damage from bombs was very often the measure of the enthusiasm for the Russians, for it was they who had taken the main weight

off us," his method of presentation, appropriate as it may be in England, is likely to be less effective in this country, which has been spared the ordeal of air raids and where some at least may feel that bombing is not necessarily conducive to clear thinking.

A successful journalist and a poet of no mean ability, Sir Bernard, as a historian, belongs to the romantic school of the nineteenth century. Hence, perhaps, his marked tendency to explain complex historical developments in simple and dramatic terms. He believes, for instance, that the Russian revolution of 1917 was due primarily to the foolishness of the Empress and the influence of Rasputin, or—and this is truly surprising—that the German revolution was retribution for sending Lenin to Russia "in a sealed wagon." Romanticism and emotionalism reach their high pitch in Sir Bernard's discussion of religion and, especially, of patriotism; it seems never to occur to the author that official pronouncements and the rigidly controlled press may not necessarily reflect the real feeling of the country. Stalin is pictured as a true leader of the nation, a far-sighted statesman who (almost like Mussolini in Fascist Italy) is always right. As to the concrete questions involved in the future peace settlement Sir Bernard has little to contribute. According to him Stalin "will claim the frontiers to which Russia's past and her services in the present war entitle her." What this elastic formula, seemingly irreconcilable with the Atlantic Charter and other allied pronouncements, actually means is being gradually and reluctantly disclosed in the daily press by the allied censorship which ministers to our intellectual welfare.

MICHAEL T. FLORINSKY

Prelude to Silence: The End of the German Republic. By Arnold Brecht. New York: Oxford University Press, 1944. Pp. xxi, 156. Appendixes. Index. $2.00.

Dr. Brecht is one of not more than a dozen Germans whose position during the Weimar Republic entitles him to speak with unquestioned authority about this difficult period in German history. As a participant in several of the great struggles for the maintenance of republican supremacy, and as an official very close to the center of governmental power, he had a unique opportunity to evaluate and interpret that critical period. This he has done for us very calmly and judiciously in a compact and closely reasoned book.

Dr. Brecht presents the reasons why nothing was done, at least of an effective nature, to stop Hitler. The book is therefore essentially an apologia for the civil service, the Reichstag, the democratic parties, and the sovereign voters. It tacitly admits that German legal science, German expert administration, and German democratic political leadership were not equal to the task of combatting and defeating "the sliding revolution under legalistic guise."

The author with great fairness and penetration points out why democracy succumbed in Germany. He believes "that Hitler's access to power on 30

January 1933 would not have taken place if any of a number of factors had been different." He calls Hindenburg's dismissal of Brüning a "flagrant disregard of parliamentary principles," and he lists some of the weaknesses of the Weimar Constitution which seem to him to have contributed materially to the collapse of democratic institutions.

Without detracting from the author's substantial contribution to our knowledge of German political institutions, it is only fair to say that the author is not always convincing, nor does he include as a part of his analysis every important aspect of German government which has relevance to the discussion. For instance he does not mention the possible use of the initiative and referendum, the ineffectiveness of the so-called *Ueberwachungsausschuss*, or the failure of Oberreichsanwalt Werner to act on the recommendation of the Prussian police to outlaw the Nazi party in 1930 and 1931 because of its treasonable character. Nor does he deal with Dr. Brüning's principal problem of trying to get the Reichstag to deliberate about intricate problems of financial policy, and the faulty procedure of the Reichstag.

Dr. Brecht gives us a good picture of the difficulties of parliamentary government under the multi-party system. But one of his principal complaints is against proportional representation—not just the German type, but proportional representation as such. He avers that the detested Communists and the hated Nazis would not have received so many seats in the Reichstag if some other electoral system had been used. It seems not to matter that all voters and all main streams of opinion should be properly represented in a legislative body, and that other democratic countries have managed to operate with both proportional representation and a multi-party system. In this part of the book Dr. Brecht is not only unconvincing but he also relies too much on *ex parte* evidence. There are many more important reasons for the failure of German democracy than its particular electoral system, which by the way might have been changed to overcome most of the valid objections.

The book does not adequately explain why German officialdom and the German people could have relied on a man like Hitler, whose bad public record must have been widely known; or why they could have been so completely taken in by "the sliding revolution" as the author aptly terms the series of semi-legal and violent acts by which the Nazis achieved power. Didn't anyone see the mailed fist behind speeches, oaths, laws and decrees? Why didn't the Reichstag and the people rise up the moment Hindenburg and Papen took liberties with the parliamentary system? Admitting the defects of institutions, the fact seems to be that a sufficient body of Germans supported Hitler to make possible his rise to power, and that the guardians of democratic rule were so attached to institutions and the letter of the law that they did not prove equal to the dynamic challenge of Nazism. The author does not expressly admit this, preferring to criticize constitutional provisions, rather than the persons who operated them.

No student of German affairs should fail to ponder this authoritative if

somewhat autobiographical book. Whether one agrees with its opinions or not, the book has recaptured so much of the sad story of Germany's failure to measure up to the requirements of democratic government, that it forms an indispensable part of the record which no serious student can overlook.

JAMES K. POLLOCK

NOTES

Commencement Address by John Bassett Moore at the Dedication of the John Bassett Moore High School at Smyrna, Delaware, 17 June 1936, together with a Bibliography of his Writings. New Haven: Yale University Press, 1944. Pp. 50. John Bassett Moore was born at Smyrna, Delaware, in 1860. In 1936, when the old Smyrna High School gave way to a large modern structure, the Board of Education of the District unanimously resolved that the school should thereafter be called the "John Bassett Moore High School." And Moore was invited to give the commencement address that June.

Ask the man who has been laden with national and foreign honors whether any reward is as sweet as the loving recognition of his neighbors and of the descendants of the men and women who dwelt in his birthplace. The Mexican Secretary of State for Foreign Affairs (Pani) may refer in a diplomatic note to "the American, Moore, held to be an authority on the subject [international law] throughout the civilized world." The members of the League of Nations may honor him with a seat on the bench of the highest court in the world. His works may be cited by scholars, historians, and diplomats from one generation to the next. The Department of State of his native land may rely on his wisdom to guide policy in delicate situations. Hundreds of young workers in the vineyard may look to him for the inspiration of his common sense and of his knowledge of men and affairs. But to have the high school of his birthplace named for him was, as Moore himself said in his commencement speech, "the greatest personal honor ever conferred upon me."

The editors have performed an inestimable service in assembling in twenty-five pages a complete bibliography of Moore's books and other publications, from a boyhood speech in 1877 to the volumes thus far completed under the head of *International Adjudications, Ancient and Modern.* Here we find listed scores of thoughtful book reviews; articles in learned and popular magazines and quarterlies, both American and foreign; impromptu observations on sundry celebrations and occasions; "letters to the editor"; even a poem or two; and, of course, the great books whose titles are familiar to all.

HENRY S. FRASER

Report of the Work of the League of Nations, 1942–43. By the Acting Secretary-General. Geneva: published by the League, 1943. Pp. 117. This document provides a useful summary of League (C.25. M.25.1943) activity in familiar fields: Economic, Financial and Transit Questions, Health, Drug Traffic, Social Questions, and assistance to refugees, Legal and Administrative matters, and the League Library.

A much reduced staff, now including but 100 officials in Geneva instead of 700 in 1939, has continued to serve as a coördinating body of League activities of an essentially research and reportorial character. Together

with a small staff in the League "branches" at Princeton, Washington, and London this group has kept alive the name of the League and preserved its entity during times when the center of world attention was definitely elsewhere.

Since the so-called peace-loving states did not use the League machinery to organize themselves in the war against aggression, this report covers only non-political activities. The problems with which the League has been concerned have been fundamentally the same as received its attention during the inter-war period, subject of course to influences of the war itself. At the same time these are also the problems which individual nations are facing under the more modern classification of "post-war problems."

While it is probable that a somewhat new approach will be needed in establishing an effective security organization, it should be possible to salvage the bulk of the League's technical experiences and services. What the League has accomplished here during more than twenty years is fundamental to the work of any new organization that may evolve from current discussions. No international organization can do much more than its member nations expect of it and no new functional organizations will do any better than the League unless the national pattern of thinking is drastically changed.

The report for 1942–43 provides a useful summary of the work of the various League technical agencies, including the meetings held, memoranda prepared, and relations with United Nations organizations. The Economic, Financial, and Transit organizations were chiefly concerned with problems which will arise after the war while the Health Organization and the international drug administration necessarily were faced both by wartime and post-war problems. The Secretariat recorded thirteen new treaties and the Treaty Series has continued to be published. The Legal Service has carried on a series of studies including a classification of provisions of all conventions, attributing powers and duties to the organs of the League of Nations. Finally, there is a brief report on the budget, the building, and the library. (In spite of the war, the library in 1942 added nearly 5,000 titles to its collection, not including Government publications and periodicals).

WALTER H. C. LAVES

Woodrow Wilson Still Lives—His World Ideas Triumphant. By J. Eugene Harley. Los Angeles: Center for International Understanding, 1944. Pp. xiii, 193. Appendix. Index. $2.00. It is unfortunate that the ideals of Woodrow Wilson regarding world peace, and the principles enunciated by him upon which peace could be established, became known as Wilsonian ideas and principles. They were not his principles in the sense that he originated or alone supported them but only in the sense that he accepted them and became their most noted and most able advocate. They were based upon the experience of the past, represented the best thought of Wilson's time regarding peace, and are still valid. As soon as Wilson adopted them, however, they were opposed by his chief political opponents, defended by his supporters, and became enmeshed in politics. Perhaps the time has come when they can be considered on their merits.

This book by Professor Harley, with an introduction by Eleanor Wilson McAdoo, is divided into four principal divisions. The first half of the volume deals, in a none too well organized fashion, with the defeat of the League of Nations in the United States, the era of isolationism, revival of support for the League idea, and some of the plans for a new league of

nations. The second part, entitled "Let Woodrow Wilson Speak Now" consists of selections from Wilson's speeches together with running narrative by Professor Harley giving the setting for each excerpt. The third section is a collection of comments on Woodrow Wilson and his ideals by some thirty prominent men including Herbert Hoover, James T. Shotwell, Claude Pepper, and William Allen White. And the fourth section provides brief descriptions of some of the historic plans for world peace beginning with the Achaean League and ending with the Connally Resolution.

This volume is not a critical study, includes nothing that is particularly new regarding Wilson or his ideas, and, since documents are not printed in full, is not very valuable as a reference work. It is an accessible collection of materials not easily found elsewhere, and is a useful corrective for disparaging estimates of the importance of Wilson's ideas.

RUHL J. BARTLETT

A Modern Foreign Policy for the United States. By Joseph M. Jones. New York: Macmillan, 1944. Pp. viii, 94. $1.35. Here is an intrepid and timely little book written in an hour of disillusionment to protest the *lenteur* and headlessness of the Department of State in the days before the advent of Mr. Stettinius to the undersecretaryship. Writing from firsthand knowledge of the inside operations of the Department, the author avoids a vituperative, personalized approach, yet courageously conveys to the lay reader something of his ardor for reform and his despair at staticity. This is the volume's most important function, and Jones deserves particular praise for his forthright depiction of what goes on. The remedies suggested are less convincing. While American foreign policy can hardly grow commensurately with our increased responsibilities without taking the public more fully into account, to Congressionalize it, by making its every move dependent on House or Senate validation, seems rather to jump from the frying pan into the fire. Public accountability by periodic reporting to the citizenry without homiletics, yes; humiliating periodic Congressional inquest over the State Department, no—such is the reaction of the reviewer to Jones' proposals.

The volume fits into the general pattern of the flood of literature now pouring from many presses, reëxamining the foundations of previous policy and suggesting, for our day and our time, the appropriate superstructure. Like other current offerings it tends to suffer from perfectionism—a dogmatic belief in the efficacy of proposed new procedures—and from rather indiscriminate condemnation (cf. pp. 1–2) of basic postulates of previous policy. It is, notwithstanding, provocative, restrained in its evaluation of personal factors, and deserves a place on many a table or shelf hitherto not concerned with discussions of foreign affairs.

MALBONE W. GRAHAM

Canada After the War. Studies in Political, Social and Economic Policies for Post-War Canada. Edited by Alexander Brady and F. R. Scott. Toronto: Macmillan, 1944. Pp. 348. $4.25. This excellent and provocative collection of essays on Canada's post-war problems is the work of a number of distinguished contributors, nearly all professors, and is published under the auspices of The Canadian Institute of International Affairs. It makes no attempt to deal with all phases of post-war reconstruction and as many of the chapters were completed early in 1943 they do not include some important developments which have occurred since that time. Being

social scientists, the authors pose and develop the questions at issue in great detail, but refrain from advocating specific solutions, knowing full well that the answers will eventually be given by the Canadian people acting within the framework of their political parties.

Canadians, like all other peoples, want peace and security after this war, and full employment, with all its implications. They would like to see the interests of producers and consumers, of capital and labor, united for the common good. To bring this about we shall probably witness the death of *laissez-faire* and an increase in the economic and social functions of the state, efforts to provide a more equitable distribution of income, to eliminate monopolistic exploitation and the business cycle, to develop social security legislation, a program of public works, international trade, exchange stabilization, and guarantees for agriculture. To a discussion of these economic policies over half of the present volume is devoted.

For readers of this JOURNAL the chapters on "Parliamentary Democracy," "The Constitution and the Post-War World," and "Canada and the World," are likely to prove of greatest interest. The Dominion Parliament, like the American Congress, is in partial eclipse. Policies of greatest importance have been determined in Canada by Order-in-Council, without debate in Parliament, and often by mere announcement on the radio. Over 25,000 such executive orders had been issued by 1943 and during three years of war the Dominion Parliament sat only 42 weeks. Obviously, the Parliamentary tradition is much weaker in Canada than it is in England, and one of the major problems after the war will be the revitalizing of parliamentary institutions, in order to end the present régime geared to total war. This means an overhauling of internal procedures, including the committee system, making a growing bureaucracy more efficient and responsible to the people, and revising the constitutional balances between the Dominion and the provinces and between the executive and the legislative powers. The task is so complex and difficult that it will tax the political ingenuity and the good will and coöperative spirit of the Canadian people to the utmost, and it must be remembered that all these issues must be resolved against the background of Quebec's insistence upon her distinct cultural entity. In world affairs, Canada will continue to be pulled in two directions, southward toward a North American isolationism and continentalism and eastward toward coöperation with the Mother Country and other members of the Commonwealth in imperial problems.

These essays provide much food for sober thought. There will be no easy road into the post-war world of "the Four Freedoms." American readers will profit by this volume almost as much as Canadians, for many of the problems of the two neighbors are strikingly similar. Moreover, what the United States will do about them, and what rôle she will elect to play in the international order, will decisively affect the future of Canada.

CARL WITTKE

Direito, Solidariedade, Justiça. By Haroldo Valladão. Rio de Janeiro: José Olympico, 1943. Pp. 205. This volume of collected addresses in Portuguese by a distinguished jurist who is professor of international law in the University of Brazil and for the current year president of the Bar Association of Rio de Janeiro merits attention not only because it illustrates the Ciceronian style of oratory which is the tradition of the Brazilian bar but because it gives evidence of the strong sense of personal responsibility for

the proper administration of law and justice which is inculcated in the law schools of Brazil. The address to the graduates of the Law School in 1940 is notable for its effort to maintain a just balance between the rights of the individual as the primary social unit and the need of a socialized jurisprudence. The address on the ideal of law and justice is a sharp attack upon the tendency to supplant judicial processes by the decisions of irresponsible administrative bodies.

C. G. F.

The Growth of the Red Army. By D. Fedotoff White. Princeton: Princeton University Press, 1944. Pp. 486. $3.75. Dimitri Fedotoff White has given us a substantial work of enduring value in this study. Although the author contends that this is not a "definitive" book nor an outline of its history yet the book is by all odds the best in the field. It is a study of the organizational growth of the armed forces of the Soviets, of the component groups within them, and of the conflicts among these groups.

Whence come the amazing prowess, superb striking power, and stamina of the Red Army? Many observers have advanced the thesis that the strength of the Red Army lies in the fighting hearts of its soldiers, in the severity of its training, in its iron discipline, and in the support it receives from a ruthless organization of the country's wealth and civilian strength. These stereotypes, though true in themselves, do not go beyond the level of simple panegyrics. Instead of this the present author has chosen to outline the historic heritage of the Russian army from Imperial times and to trace the growth of the armed forces of the Soviet Union from the somewhat hasty improvisations of the Civil War period onward, emphasizing the important part played by the former officers and members of the military administration of the old Russian Army.

Of particular value is Mr. White's evaluation of the profound and interrelated political, economic, and social factors that affected the growth of the Red Army during the various stages of its development. Thus the resurgent nationalism of Soviet Russia, the gigantic industrialization of the country, and the wide-spread educational advances were of paramount significance in the development of the Red Army.

Mr. White is one of the very few students of the military factor as an integral part of the Soviet economy who has called attention to the outstanding rôle played by the *Osoaviakhim*, or Society for the Furthering of the Defense, Aviation, and Chemical Development of the U.S.S.R. In June, 1927, the *Osoaviakhim* absorbed within itself several other volunteer defense organizations and was rapidly expanded during the years of the First Five Year Plan. It laid the foundation for the truly universal military training of the entire population fit to carry arms, with accent on the training of the urban population first, and of the Kilkhoz peasants of the collectivized sector of rural Russia next. Thanks to the perspicacity of its leaders, *Osoaviakhim* had anticipated by many years the various forms of mass civil defense of Western Europe. Next to the enormous growing industrial capacity of the country, *Osoaviakhim* contributed to the ability of Russia to withstand, without collapsing, the onslaught of the allegedly invincible Wehrmacht. In line with the mechanization and modernization of the U.S.S.R. and its armed forces the *Osaoviakhim* concentrated upon the study of the latest technical military means. This pre-draft military training had led to the mass militarization of the Soviet population, which made possible the rapid filling in of gaps due to losses in war, as well as to

the formation of a tremendous reservoir of semi-trained manpower for new army divisions to be created in the course of a war.

Another significant factor in the growth of the efficient unity of command of the Red Army has been the vast number of professionally trained military officer corps. After 1928, when the First Five Year Plan was introduced, most of the secondary and college and university students were educated and trained in the spirit and in the science of military sociology and kindred disciplines. In fact the new growing Soviet intelligentsia knows no other form of education; nor did they have access to any reading materials other than those prescribed in the required curricula. Now there were 550,000 university and college students in Soviet Russia before the outbreak of the war. This phenomenon also helps to explain the wartime efficiency of the Soviet officer corps as well as the youthful age of the average Soviet general who leads the Red Armies.

On previous occasions this reviewer called attention to the irony of fate that the Nazi onslaught against Russia has, more than any other single factor, brought about greater cohesion among the dissident elements within the Soviet Union. The youthful officer corps as well as the Russian soldiers have been imbued with a carefully directed spirit of nationalism and patriotism to such extent that the "glory of the Fatherland" and the "Defense of the Motherland" have become deeply embedded psychological factors which have found their expression on the battlefields. As a matter of fact this accentuated national and patriotic spirit has permeated Soviet life throughout the period of the Stalin regime. Mr. White rightly points to the conspicuous absence of Marxism from the prescribed curriculum in Soviet military colleges. The work is replete with meticulous documentation from official Soviet sources.

CHARLES PRINCE

Voices from Unoccupied China. Edited by Harley F. MacNair. Chicago: University of Chicago Press, 1944. Pp. iv, 107. Index. $1.50. Instead of formal lectures on the Harris Foundation in 1943 a group of eminent Chinese scholars, some of them invited to the United States by the Division of Cultural Relations of the Department of State, participated in round-table discussions before limited audiences. They considered the government and politics of Free China, public health, economic problems, social problems, and education.

Observations were reasonably frank when it is remembered that the speakers were under the indirect surveillance of the powerful Kuomintang. These voices came only from that part of unoccupied China controlled by the Chungking government.

Editor MacNair's introduction contains not only short biographies of the speakers but also material from discussions which followed and supplemented the experts' talks. Readers may find it profitable to turn to these introductory portions after having read the corresponding original comments.

Dr. Liu Nai-chen's treatment of government in Kuomintang China describes how the exigencies of war have further concentrated political power in the hands of the Supreme Committee of National Defense and of its chairman, Chiang Kai-shek. A few naïve remarks crept in, *e.g.*, that there are now "no traces of aristocratic class rule"; that "the Communist party never enjoyed genuine widespread, popular support"; and that after the war, "reactionary elements will have no chance of causing trouble."

One of the most vital reports was made by Dr. Fei Hsiao-t'ung from the

researches of a group of sociologists in war-affected Yünnan province. He reveals much in these three sentences: "The economic reward for social values is now precisely the reverse of what it formerly was [in imperial times]. Now the merchant is first, then comes the factory laborer, then the peasants, and then the scholars. The world is upside down from the viewpoint of the traditional scale of social values" (p. 59).

ALLAN B. COLE

China Handbook, 1937–1943. Compiled by the Chinese Ministry of Information. New York: Macmillan, 1943. Pp. xxiv, 876, lxxvi, xv. Tables. Map. Index. $5.00. Worthy of being on any reference shelf concerned with the Chinese Republic is the *China Handbook* covering the war years *1937–1943*. It is more condensed than the *Yearbook* which has been interrupted since 1941 by vicissitudes of conflict. For example, the summary of military compaigns is more compact; strategical maps have been omitted. So successfully is the abridgement done, however, that one is inclined to hope that hereafter the Chinese Government may publish a handbook every two or three years only, with statistical supplements annually.

The *China Handbook* is compiled by the Chinese Ministry of Information, which is an agency of the Kuomintang, not of the Government proper. It may, therefore, be regarded as containing orthodox descriptions of party and government, the structure of both being outlined in separate chapters. One is enabled to grasp the full significance of the general fact that the Government of China is not yet responsible to the people but to the party. Wartime changes and planning for post-war development receive much attention.

The *Handbook* emulates the *Yearbooks* in frequently quoting passages from speeches and documents of party and governmental leaders. As compared to its predecessors, however, more emphasis is placed proportionately on the party, courts and prisons, military affairs, mineral resources, price and commodity control, the press, relief activities; a whole chapter is devoted to the municipality of Chungking. Foreign relations are treated in the usual manner, except that the editorial influence of Hsu Shu-hsi is less evident; and a section on the abrogation of extraterritoriality has been added.

In addition to tables of assorted information about China at the beginning, the *Handbook* concludes with four chapters listing, with descriptions, a variety of Associations and Societies, giving a Chronology of Major Events, a Government Directory, and 76 pages of a Chinese Who's Who. In the reviewer's opinion the organization of the latest compilation is superior to the previous annual volumes; the index is about the same—only moderately good.

ALLAN B. COLE

The Tyrants' War and the Peoples' Peace. By Ferdinand A. Hermens. Chicago: University of Chicago Press, 1944. Pp. xiii, 250. Index. $2.75. *You and the Peace.* By G. B. Shirlaw and L. E. Jones. London: Macmillan, 1944. Pp. vi, 177. $1.75. Mr. Hermens has written an exhortation against "Vansittartism," as a growing force in America. He states two possible alternative attitudes toward a defeated Germany: a willingness to make a peace "morally acceptable to the people in Germany who are willing to live and let live," or a retaliatory determination to keep Germany sub-

jected by force. The American public, he thinks, is now gripped by a wartime crowd-psychology tending toward the latter, but he gives little evidence for the spread of "Vansittartism" here. He omits a third alternative, at least possible for America, of a post-war relapse into indifference. Most readers will agree that it is absurd to regard the whole German nation as inherently and irredeemably militaristic, and dangerous to try to build a permanent peace upon force alone. They may nevertheless be unable to accept all Mr. Hermens' proposals for a moderate peace. He would restore the pre-1938 boundaries of Germany; he warns against any partition of Germany, but would dissolve Prussian unity within a new federal system; he would avoid impossible cash reparations; he would establish an immediate provisional government, with democratic machinery, under German leadership, rather than a temporary military government by the United Nations, expecting this new democratic government to expropriate large estate owners and extend a system of peasant farming. He believes that democratic forces will reappear promptly in Germany once Nazi repression has been removed, that passive adherents to Nazism will promptly shift allegiance, and that there can be no serious danger from the discredited Nazi remnants if reasonable peace terms are offered. His optimism rests on an analysis of the history of recent Germany and of the Nazi dictatorship, occupying more than half the book. He exonerates the majority of the Germans from responsibility for the Nazi program, claiming that the establishment of the dictatorship was largely due to proportional representation, which made the Nazi party available to receive the depression "protest vote," and that most of those who voted for the Nazis were not interested in nationalism or anti-Semitism. Both points are questionable. He argues convincingly that once the dictatorship was established effective resistance became impossible, and, less convincingly, that experience of Nazism has prepared the German people for democracy. One may hope with Mr. Hermens that experience of Nazism has created a general revulsion against Nazism, and yet doubt whether twelve years of Nazi dictatorship have left material for an immediate revival of a viable democratic system.

You and the Peace is avowedly a book by non-experts for the non-expert British reader. Written in a bright, chatty style, it combines considerable incidental shrewdness, especially on probable post-war psychology, with considerable naïveté on major problems. The authors regard nationalism as the one ultimate cause of war; their proposed remedy is a World Police Force to administer a World Criminal Code.

JOHN D. LEWIS

Intervention at Archangel: The Story of Allied Intervention and Russian Counter-Revolution in North Russia, 1918–1920. By Leonid I. Strakhovsky. Princeton: Princeton University Press, 1943. Pp. 336. Maps. Appendices. Index. $3.00. Problem: to establish a military government in the territory of a recent ally who has made a separate peace with a strong enemy still occupying portions of its territory and is now torn by a revolution against property. This is the theme of *Intervention at Archangel,* whose description of Allied military government in northern Russia at the close of World War I tells us that fumbling at any rate is not new and suggests the possibility that fumbling may occur because the problem is difficult. After Brest-Litovsk the Allies knew that they must meet German armies now freed for action in the west. It was a military problem to contain as many of them in the east as possible; to keep stores of supplies from Ger-

man hands, and to forestall German submarine bases on the Murmansk coast. It was not an unreasonable expectation that a small Allied force might achieve results out of all proportion to its size, particularly should it become the nucleus of a new Russian army. As it turned out, the Allies beat the Germans in the west, and the force in northern Russia fought only Bolsheviks. Neither the Allied soldiers nor their peoples would support this after the armistice in the west, and the Russian population in the northern region turned increasingly to the Soviets and against the foreign invaders. The Allied governments withdrew, ending the effort to prevent the firm establishment of communism in Russia.

The study is full of instruction on the troubles which plague military governments, particularly joint ones. The objectives were confusingly stated. The intervention began as a military one and really succeeded in its military purposes, but almost immediately became an anti-Bolshevik crusade. Not all the participating governments were sure how far they wanted to go in this respect, the French being the most persistent. The British and the American governments took the lead in proposing the conference at Prinkipo, with a view to getting a Russian government satisfactory to most Russian elements. This was good liberal doctrine then, as now for Italy and France, but only the Bolsheviks accepted and the project failed. The expedition had already had its troubles with the Russian political leaders in forming a government. Bolsheviks were barred on account of Brest-Litovsk and monarchists in order to save liberal principles. The Government of Chaikovsky represented the left non-Bolshevik groups, the bourgeois elements being largely excluded. This Government did not have strong popular support, and had to be saved from a *coup d'état* of its own military commander, Chaplin, by intervention of the Allied representatives. Moreover, the desire to form a Russian army made it necessary to take in Russian officers, many of whom were monarchists. The Allies never permitted to Chaikovsky's government more than a shadow of authority. The Allied control itself was badly organized. Consisting of diplomatic representatives of French, British, and American Governments, it had some difficulty controlling even the British officers in charge of the Allied military forces. The result was constant bickering: between the diplomatic representatives themselves, between them and the British commander and the Chaikovsky Government, and between the British commander on his own account and the Chaikovsky Government. The expedition failed probably because of the larger political developments, but on the technical plane it should serve as a classic example of how not to conduct such an enterprise.

Mr. Strakhovsky deserves the highest praise for the objectivity of his treatment.

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INTERNATIONAL LABOR ORGANIZATION

DECLARATION AND RESOLUTIONS (SELECTED) OF THE INTERNATIONAL LABOR CONFERENCE.

Twenty-sixth Session, Philadelphia, April–May, 1944 *

DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANISATION

The General Conference of the International Labour Organisation, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organisation and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that:

(*a*) labour is not a commodity;

(*b*) freedom of expression and of association are essential to sustained progress;

(*c*) poverty anywhere constitutes a danger to prosperity everywhere;

(*d*) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:

(*a*) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;

(*b*) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;

(*c*) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;

* International Labor Office, Official Bulletin, Vol. XXVI, No. 1 (1 June 1944).

(*d*) it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;

(*e*) in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

III

The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve:

(*a*) full employment and the raising of standards of living;

(*b*) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;

(*c*) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;

(*d*) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;

(*e*) the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

(*f*) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;

(*g*) adequate protection for the life and health of workers in all occupations;

(*h*) provision for child welfare and maternity protection;

(*i*) the provision of adequate nutrition, housing and facilities for recreation and culture;

(*j*) the assurance of equality of educational and vocational opportunity.

IV

Confident that the fuller and broader utilisation of the world's productive resources necessary for achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations, to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade, the Conference pledges the full co-operation of the

International Labour Organisation with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples.

V

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world.

RESOLUTIONS

RESOLUTION I

Resolution concerning social provisions in the peace settlement

Whereas the Conference is called upon to make recommendations to the United Nations for present and post-war social policy, and more particularly concerning the social provisions to be inscribed in the various general or special treaties or agreements to which the United Nations will jointly or severally become parties;

Whereas the prospect of a complete victory of the United Nations makes it possible to prepare a better world order directed towards the achievement of the social objectives which these nations proclaimed in the Atlantic Charter in expressing their desire to bring about the fullest collaboration between all nations in the economic field with the object of securing for all improved labour standards, economic advancement and social security:

I

The Conference considers that the principles stated in the following draft are appropriate for inclusion in a general or special treaty or agreement between nations desirous of giving early effect to the principles of the Atlantic Charter and Article VII of the Mutual Aid agreement:

The signatory Governments:

Having pledged themselves to provide conditions which will ensure an increasing measure of freedom from want to their own peoples and to all peoples;

Recognising, therefore, their common obligation to foster expanding production and employment on a sound basis, free from disruptive fluctuations, and to ensure that workers and productive resources shall not be allowed to be idle while the needs of large parts of the world remain unsatisfied;

Realising that the economic life and conditions in each nation are increasingly dependent upon the economic life and conditions of other nations, and that hence the attainment of the above-stated objectives requires increasing collaboration among nations;

Have agreed that:

ARTICLE I

The Declaration concerning the aims and purposes of the International Labour Organisation adopted by the International Labour Conference at Philadelphia in 1944, the text of which is annexed, is hereby reaffirmed.

ARTICLE II

Each Government recognises its duty to maintain a high level of employment. Accordingly, all arrangements by and among the signatory and other like-minded Governments for international economic co-operation should be framed and administered to serve the objectives set forth in Article I. They should be directed to the expansion of production, employment and the exchange and consumption of goods and to the liberation of economic activity from unreasonable restrictions. Particular consideration should be given to measures for promoting the reconstruction of economic life in countries whose economic and social life has been disrupted as the result of Axis aggression.

ARTICLE III

The following matters are of international concern and should be among the social objectives of international as well as national policy:

1. Opportunity for useful and regular employment to all persons who want work, at fair wages or returns and under reasonable conditions, with provision for protection of health and against injury in all occupations;
2. Raising standards of living to provide adequate nutrition, housing, medical care and education;
3. Establishment of minimum standards of employment to prevent exploitation of workers, whether employed or self-employed, whose opportunities for high-wage employment are limited;
4. Provision for child welfare;
5. Provision for a regular flow of income to all those whose employment is interrupted by sickness or injury, by old age or by lack of employment opportunity;
6. The effective recognition of the right of freedom of association and of collective bargaining;
7. Provision of facilities for training and transfer of labour.

ARTICLE IV

The International Labour Office may, under standards constitutionally

determined by the International Labour Conference, as occasion requires, collect from, and interchange with, the signatory Governments, uniform statistical and other economic information on the following matters which are among those of direct interest to the International Labour Organisation and are of international concern:

1. Employment, wages and conditions of work;
2. Standards of living and the distribution of income, with particular reference to wage and salaried workers;
3. Technical education and training for employment;
4. Industrial health, safety and welfare;
5. Industrial relations;
6. Social security; and
7. Administration of labour and social security legislation.

ARTICLE V

With respect to the matters set forth in Article III:

1. The Governments, through appropriate international agencies, shall develop standards and statistical measures, and shall maintain uniform statistics and other information;

2. The Governments shall interchange among themselves and make available to the International Labour Organisation such information and reports as may be required to assist them and the Organisation to develop Recommendations with respect to such matters;

3. The Governments shall take appropriate steps to assure close collaboration and full exchange of information between the International Labour Organisation and any other international bodies which now exist or may be established for the promotion of economic advancement and social well-being;

4. The Governments shall take appropriate steps to have placed on the agenda of the International Labour Conference annually the subject of the extent to which the social objectives set forth in Article I have been attained and on the measures taken during the year towards the attainment of the objectives.

ARTICLE VI

With respect to draft international Conventions and Recommendations adopted by the Conference in accordance with Article 19 of the Constitution of the International Labour Organisation, the signatory Governments undertake to report to the International Labour Office as requested by the Governing Body on the status of legislation and administration and, in so far as practicable, of practices under collective agreements between employers and workers.

Declaration concerning the aims and purposes of the International Labour Organisation *

The General Conference of the International Labour Organisation, meeting in its Twenty-

* As in original. — Ed.

sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organisation and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organisation is based and, in particular, that:

(*a*) labour is not a commodity;

(*b*) freedom of expression and of association are essential to sustained progress;

(*c*) poverty anywhere constitutes a danger to prosperity everywhere;

(*d*) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:

(*a*) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;

(*b*) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;

(*c*) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;

(*d*) it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;

(*e*) in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

III

The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve:

(*a*) full employment and the raising of standards of living;

(*b*) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;

(*c*) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;

(*d*) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;

(*e*) the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

(*f*) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
(*g*) adequate protection for the life and health of workers in all occupations;
(*h*) provision for child welfare and maternity protection;
(*i*) the provision of adequate nutrition, housing and facilities for recreation and culture;
(*j*) the assurance of equality of educational and vocational opportunity.

IV

Confident that the fuller and broader utilisation of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations, to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade, the Conference pledges the full co-operation of the International Labour Organisation with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples.

V

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world.

II

The Conference recommends that the Governing Body of the International Labour Office:

1. Call a special conference of the Organisation, when in its opinion there is a danger of a substantial fall in general employment levels, for the purpose of recommending appropriate national or international measures to prevent the development or spread of unemployment and to establish conditions under which high levels of employment may be maintained or restored;

2. Correlate the activities of the International Labour Organisation towards the end of maintaining full employment with those of any other international agency or agencies which may be designated by the United Nations to have primary responsibility in related economic fields.

III

The Conference recommends that:

1. The United Nations should undertake—

(*a*) to apply to any dependent territories, in respect of which they have accepted or may accept a measure of international accountability through any international or regional commission or other body, the principle that all policies designed to apply to dependent territories shall be primarily directed to the well-being and develop-

ment of the peoples of such territories, and to the promotion of the desire on their part for social progress;

(*b*) to apply to such territories the provisions of the Forced Labour Convention, 1930; the Recruiting of Indigenous Workers Convention, 1936; the Contracts of Employment (Indigenous Workers) Convention, 1939; and the Penal Sanctions (Indigenous Workers) Convention, 1939;

(*c*) to make a periodical report to the International Labour Office in respect of each such territory indicating the extent to which effect has been given to the provisions of the Social Policy (Dependent Territories) Recommendation, 1944;

(*d*) to ask the International Labour Office to appoint, in continuation of the collaboration established in the case of the Permanent Mandates Commission, a representative on any committee which may be entrusted with the task of watching over the application of the principle of international accountability, and further to ensure that any facilities which may be afforded, in the form of inspection or otherwise, for the better implementation of this principle, shall include appropriate measures for examining the application of the above-mentioned Conventions and Recommendation.

2. When determining the future status of dependent territories which on 1 September 1939 were controlled by Axis Powers, the United Nations should specifically require the application thereto of the arrangements provided for in the preceding paragraph.

3. In any negotiations regarding the organisation, control and operation of merchant shipping, and in particular in making international arrangements for the disposal of merchant shipping tonnage, the United Nation concerned should consult the competent bodies of the International Labour Organisation, such as the Joint Maritime Commission, in regard to the possibility of including stipulations concerning the standard of accommodation to be provided for crews and stipulations embodying the provisions of Conventions already adopted by the maritime sessions of the Conference, or of any further such Conventions that may be adopted before the negotiation of such agreement.

4. In making international arrangements concerning transport by air, land, and inland waterway, the United Nations should have due regard to the repercussions of such arrangements on the working and living conditions of persons employed in transport, and should consult the International Labour Organisation in regard to such repercussions and more particularly in regard to the working and living conditions of persons who, in operating such transport systems, work in or under the jurisdiction of more than one country.

5. The International Labour Organisation should make available to the

United Nations any information or assistance calculated to facilitate the implementation of the proposals contained in the resolution concerning economic policies for the attainment of social objectives and the present resolution and should be prepared to participate in any international conference which may be considering such proposals.

IV

Believing that the exceptional opportunity of the negotiations of the peace settlement should be taken to secure a concerted advance in the acceptance of binding obligations concerning conditions of labour;

The Conference, reaffirming the principle of the association of management and labour in the framing of such standards;

Recommends:

1. That throughout the peace settlement the United Nations should wherever appropriate include provisions for labour standards. In a number of cases such provisions might properly be taken from Conventions or Recommendations that have been or may be adopted by the International Labour Conference;

2. That the Governing Body should appoint a consultative committee on labour provisions in the peace settlement. This committee should hold itself in readiness, together with the Director of the International Labour Office, to give advice with reference to such provisions on the request of the United Nations or of particular groups of the United Nations. This committee should have the right to co-opt additional members of special competence with respect to the particular sets of provisions under consideration;

3. That the United Nations should make full use of this committee in any way in which they consider it appropriate to include labour provisions in the peace settlement.

V

The Conference recommends to Governments that a Conference of representatives of the Governments of the United, associated, and other Nations, willing to attend, be called at an early date, in association with the Governing Body of the International Labour Office, to consider an international agreement on domestic policies of employment and unemployment; and this Conference pledges the full co-operation and the assistance of the International Labour Organisation in calling such a conference on employment, and in helping to carry into effect appropriate decisions it might make.

RESOLUTION III

Resolution concerning the Constitution and constitutional practice of the International Labour Organisation and its relationship with other international bodies

The General Conference resolves that:

1. During periods of emergency when, in the judgment of the Governing Body, the efficient operation of the Organisation or of the Office will be advanced thereby, and the Governing Body so notifies the Members of the Organisation, it shall provide that, supplementary to the normal procedure, the following communications should be transmitted through the Director:

(a) the communication to Members of certified copies of Recommendations and Conventions in accordance with paragraph 4 of Article 19 of the Constitution of the Organisation;

(b) the communication by Members of the information concerning the action taken in regard to Recommendations required by paragraph 6 of Article 19 of the Constitution;

(c) the communication by Members of the formal ratifications of International Labour Conventions in accordance with paragraph 7 of Article 19 of the Constitution and the relevant provisions of the individual Conventions;

(d) the communication to Members of all notifications required by the terms of International Labour Conventions.

2. The Conference requests the Governing Body:

(a) to take effective steps as promptly as possible to deal with problems common to a region or to a particular industry, with due regard to the Constitution and principles of the Organisation, and its competence; and

(b) to report to the next general session of the Conference the steps taken and plans for the further regionalisation of the Office and of the Organisation and for special consideration of the problems of particular industries.

3. The Conference requests the Governing Body during the period of the deliberations of the committee to be established under the terms of this Resolution and of the development of an overall pattern of international institutions, to take appropriate steps to assure close collaboration and a full exchange of information between the International Labour Organisation and any other public international organisations which now exist or may be established for the promotion of economic and social well-being, and in the furtherance of this objective it may instruct the Director to arrange with such organisations, on conditions mutually agreeable, for

(a) the exchange of information, views, reports, studies and other documents regarding policies and measures of mutual interest and concern at appropriate stages in their formulation and execution; and

(b) the exchange of representatives without vote, at meetings convened by this Organisation and such other organisations; and

(*c*) the creation and maintenance of such joint committees as may facilitate their effective co-operation.

4. The Conference requests the Governing Body:

(*a*) to appoint a committee as soon as possible to consider the future constitutional development of the Organisation. The committee shall particularly consider the following matters in active collaboration with the Office, and in the light of the Report on Item I submitted by the Office, the resolutions and amendments submitted to the Conference, the views expressed in the Conference and any suggestions which may be communicated to the Office by Governments—

(i) the relationship of the Organisation to other international bodies;

(ii) the constitutional practice of the Organisation and its clarification and codification;

(iii) the status, immunities and other facilities to be accorded to the Organisation by Governments as necessary to the efficient discharge of the responsibilities of the Organisation;

(iv) the methods of financing the Organisation;

(*b*) after receiving and considering the report of the committee to bring to the attention of the Conference at its next general session such matters as in its judgment require action by the Conference.

5. The Conference requests the Governing Body to appoint representatives with power to negotiate, if necessary prior to the next general session of the Conference, with international authorities on behalf of the Organisation concerning any constitutional questions which at any time require immediate action, including the matters referred to in paragraph 4.

6. The Conference authorises the Governing Body to decide the place at which the Twenty-seventh Session of the Conference shall be held. In the event of a maritime session being convened in the near future, this authorisation shall apply to the Twenty-seventh and Twenty-eighth Sessions.

RESOLUTION IV

Resolution concerning the international character of the responsibilities of the Director and staff of the International Labour Office

The Conference, desirous of reaffirming the international character of the responsibilities of the Director and staff of the International Labour Office, adopts the following resolution:

1. The Director of the International Labour Office shall, on appointment, make a solemn declaration before the Governing Body that he will discharge the duties committed to him with the interests of the International Labour Organisation alone in view, will not seek or receive instructions in regard

to the discharge thereof from any authority external to the Organisation, and will at all times uphold the provisions of the Constitution of the International Labour Organisation.

2. The responsibilities of the staff of the International Labour Office shall be exclusively international in character. Members of the staff shall on appointment make a solemn declaration in the form and manner approved by the Governing Body that they will not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organisation.

3. The Conference affirms it to be the duty of the Members of the Organisation to respect fully the international character of the responsibilities of the Director and staff of the International Labour Office and not to seek to influence any of their nationals in the discharge of such responsibilities.

RESOLUTION IX

Resolution concerning the holding of a regional conference of the countries of the Near and Middle East

Whereas the International Labour Organisation, during the coming years, will have to pay closer attention to the various regions of the world where similar social and economic conditions exist; and

Whereas the raising of the social standards of the workers in town and country will largely depend upon appropriate solutions being sought to the specific problems of the regions concerned; and

Whereas the Near and the Middle East constitute a vast region of particular importance, where similar conditions prevail as regards the working and living conditions of great masses of agricultural workers, whether independent, semi-independent, or wage-paid; and

Whereas these conditions, as well as the problems with which the countries concerned are confronted in their effort towards systematic development of resources and industrialisation, require special study, exchange of experience and joint action; and

Whereas particular attention should be directed to the working and living conditions in the oil producing areas of this region;

The Twenty-sixth Session of the International Labour Conference resolves to invite the Governing Body of the International Labour Office to examine the possibility of convening at an early date a regional conference of the countries of the Near and Middle East, with a view to giving effect to the consideration of the specific problems of that region.

RESOLUTION XIII

Resolution concerning international administrative co-operation to promote social security

Whereas mutual assistance in social security administration is one of the

forms of collaboration between nations calculated to promote the progressive development in all countries of comprehensive social security schemes providing for income security and medical care; and

Whereas the International Labour Office has co-operated with Members of the Organisation in an advisory capacity in the planning and development of social security schemes by means of expert missions, and it is now desirable to take further measures to make the experience of social security administration gained by Members individually available through the International Labour Office to other Members about to introduce social security schemes or to amend their existing schemes; and

Whereas the Inter-American Conference on Social Security adopted at its first session, held at Santiago de Chile in 1942, resolutions favouring co-operation among social security administrations and institutions with a view to the unification of statistics of medical care and the encouragement of research and technical studies;

The Conference requests the International Labour Office:

(*a*) to take the necessary measures to facilitate the interchange of qualified technicians and experts by means of agreements between Members of the Organisation;

(*b*) to continue efforts to promote, on an international or regional basis, systematic and direct collaboration among social security administrations or institutions with a view to the regular interchange of information which will facilitate their work and the study of common problems in the application of social security; among these problems the following are enumerated without implying any order of preference—

(i) the comparability of statistics on the working of social security services, and their possible standardisation;
(ii) long-term investment of the reserves of social security institutions;
(iii) simplification of social security administration;
(iv) relations between social security institutions based on assistance and those based on insurance;
(v) the prevention of the risks covered;
(vi) the training and technical improvement of the personnel of of social security administration through the organisation of courses of higher study in the actuarial and accounting fields and other related to the application of social security systems;

(*c*) to study the possibility and appropriateness of international or multilateral agreements which would establish bodies responsible for performing common functions, in the field either of finances or of administration.

RESOLUTION XIV

Resolution concerning the definition of terms used in international Conventions and Recommendations concerning social security

Whereas it would greatly contribute to the clarification of the terms used in Conventions and Recommendations concerning social security to establish an international nomenclature of social security terms in order to avoid misinterpretation due to differences in the terminology employed in various countries;

The Conference requests the International Labour Office to prepare, in consultation with experts on social security, on sociology, and on economic and legal questions, a list containing definitions of terms occurring in international Conventions or Recommendations on social security, with a view to arriving at international agreement.

DESIGN FOR A CHARTER OF THE GENERAL INTERNATIONAL ORGANIZATION (GIO)*

I. Nature of the GIO

1. The primary aims of the GIO should be to maintain international peace and security and to promote the well-being of all peoples.

2. The GIO should be established by a Charter applicable to all States as the basic instrument of international law.

3. (a) The Charter of the GIO should be launched, on behalf of the community of States, by the United Nations and by such other States as may associate with them for the purpose. (b) The Charter should become operative upon its acceptance by a prescribed number of States, including certain named States.

4. (a) The Charter should provide that the GIO shall at all times comprise all existing States, and hence no provision should be made for the expulsion or withdrawal of any State. (b) A list annexed to the Charter should name the States existing at the time.

5. The Charter should provide for a procedure by which the GIO, upon its establishment, shall succeed the League of Nations.

II. Structure of the GIO

6. (a) The principal organ of the GIO should be an Assembly, meeting annually and more frequently as occasion may require. (b) Each State should be entitled to appoint three representatives in the Assembly, and should be free to select them in the manner which it considers most appropriate. (c) The Assembly should have power to pass upon the credentials of

*This document (unofficial) was published on August 1, 1944, some weeks in advance of the assembling of the conferences at Dumbarton Oaks; see above, the JOURNAL, p. 711.

States' representatives. (d) The Assembly should have power, in accordance with rules previously adopted, to restrict the participation of a State's representatives under certain conditions. (e) Each State represented in the Assembly should have one vote. (f) Unanimity should not be required for action by the Assembly; a special majority vote should be required with respect to certain matters, and in some cases this majority should be required to include the votes of the States represented in the Council or of the States continuously represented in the Council. The votes of States having less than 100,000 inhabitants should not be counted for any majority required in the Assembly. (g) In principle, all questions of procedure should be decided by a simple majority vote.

7. (a) A Council, meeting at stated intervals and as occasion may require, should be created to deal with international matters which are chiefly of political significance. (b) The Council should consist of the representatives of eleven States. After an initial period of five years the Assembly should have power, acting with the concurrence of the Council, to increase the number of States represented to fifteen. (c) The States to be represented in the Council during the initial period of five years should be designated in the Charter; the States designated in the Charter as having the chief responsibility for the maintenance of peace should continue to be represented after the expiration of the initial period until one or more of them may be replaced by the Assembly on account of essential changes in relative responsibility. (d) Subject to the foregoing provision, the States to be represented in the Council continuously or for limited periods of time should be selected by the Assembly, with reference to the importance of their rôle and responsibility in international affairs. (e) A State not represented in the Council should be entitled to participate in its deliberations on any matter specially affecting the interests of that State. (f) Each State represented in the Council should have one vote. (g) Unanimity should not be required for action by the Council; a special majority vote should be required with respect to certain matters, and in some cases this majority should be required to include the votes of the States continuously represented in the Council. (h) A State should not have a vote in the Council on any occasion in which its unauthorized use of force is in question. (i) In principle, all questions of procedure should be decided by a simple majority vote.

8. (a) A permanent Security Committee of the Council should be charged with responsibility for suppressing the use of force by States in their relations with other States and for carrying out preventive measures as authorized by the Council or the Assembly. (b) The Security Committee should be composed of the representatives of the States continuously represented in the Council, and of the representatives of such additional States as may be selected by the Assembly acting by two-thirds vote including the votes of States continuously represented in the Council. (c) A simple majority vote, including the votes of the States continuously represented in the Council,

should be required for decisions by the Security Committee. (d) A State should not have a vote in the Security Committee on any occasion in which its unauthorized use of force is in question.

9. (a) A General Commission, meeting at stated intervals and as occasion may require, should be created to deal with international matters other than those committed to the Council. (b) The General Commission should consist of the representatives of fifteen States. After an initial period of three years, the Assembly should have power, acting with the concurrence of the General Commission, to increase the number of States represented to twenty-one. (c) The States to be represented in the General Commission during the initial period of three years should be designated in the Charter; the seven States designated in the Charter as having the more general interests in international affairs should continue to be represented after the expiration of the initial period until one or more of them may be replaced by the Assembly on account of essential changes in relative position. (d) Subject to the foregoing provision, the States to be represented in the General Commission continuously or for limited periods of time should be selected by the Assembly, with reference to the importance of their rôle in international affairs. (e) A State not represented in the General Commission should be entitled to participate in its deliberations on any matter specially affecting the interests of that State. (f) The General Commission should have power to associate with itself representatives of international organizations having specialized responsibilities. (g) Each State represented in the General Commission should have one vote. (h) Unanimity should not be required for action by the General Commission; a special majority vote should be required with respect to certain matters, and in some cases this majority should be required to include the votes of the States continuously represented in the General Commission. (i) In principle, all questions of procedure should be decided by simple majority vote.

10. The Permanent Court of International Justice should be the chief judicial organ of the GIO.

11. (a) A Secretary General should be the chief administrative officer of the GIO. (b) The first Secretary General of the GIO should be named in the Charter, to serve for an initial period of five years; thereafter, the Secretary General should be elected by the Assembly on the nomination of the Council. (c) The Secretary General should be authorized to participate in the deliberations of the Assembly, the Council, and the General Commission, and to lay before these bodies any international matter which he may deem appropriate. (d) The Secretary General should have responsibility for contacts of the GIO with various international organizations, public and private.

12. (a) A Secretariat of the GIO should be established and placed under the direction of the Secretary General. (b) The members of the Secretariat should be selected on the basis of individual competence and recruited upon

as wide a geographical basis as possible. (c) The higher officers of the Secretariat should be appointed by the Secretary General with the approval of the Council; other members of the Secretariat should be appointed by the Secretary General. (d) The members of the Secretariat should be independent of any control by the States of which they are nationals, and they should neither seek nor receive instructions from any source other than the Secretary General. (e) The members of the Secretariat should enjoy diplomatic immunities in the territory of all States, subject to waiver by the Secretary General. (f) The seat of the Secretariat should be at ———. The Assembly should have power to transfer the seat elsewhere.

13. (a) The Assembly should have power to determine what general international organizations with specialized responsibilities should constitute parts of the GIO, and to adapt their basic instruments to the Charter of the GIO. (b) The Assembly should have power to adapt to the structure of the GIO any special agencies of or associated with the League of Nations, and by appropriate arrangements to acquire properties held by the League of Nations. (c) The International Labor Organization should constitute a part of the GIO.

14. (a) The Assembly should have power to deal with all questions relating to the budget of the GIO, to decide upon methods of providing funds, and to fix the proportions in which States should contribute. (b) Each State should be bound to pay its contribution promptly, and the Assembly should have power to determine the consequences of failure to discharge this obligation. (c) In accordance with regulations to be established by the Assembly, the budget of the GIO should include provisions for reimbursing States for the expenses incurred in their representation in organs or agencies of the GIO.

III. Maintenance of International Peace and Security

15. (a) The Charter should proclaim the duty of each State to refrain from any use of force and from any threat to use force in its relations with other States, except on behalf of the GIO and with its authority. (b) The Charter should provide that a State should be free to oppose by force an unauthorized use of force made against it by another State, subject to immediate reference to the Council.

16. (a) The Assembly should have power to deal with any matter affecting the peace of the world or the good understanding between peoples on which peace depends. (b) The Assembly should have power to adopt general provisions for preventing and suppressing the use of force by States in their relations with other States.

17. (a) The Council should have power, acting in accordance with policies adopted by the Assembly and subject to general control by the Assembly, to deal with any specific situation in which the peace of the world is jeopardized. (b) In dealing with such a situation, the Council should have power to prescribe the military and economic measures to be taken by States for the

maintenance of peace, and each State should be obligated to take such measures. The Assembly should have power to provide for distributing the burden which such measures may entail. (c) The Secretary General should be authorized to convoke the Council in the event of any emergency.

18. (a) The Security Committee of the Council should have power to act on its own initiative in any case of an imminent menace to peace; in all other cases, the Security Committee should act only with the specific authorization of the Council or the Assembly. (b) Each State represented in the Security Committee should be obligated to take part, to the full extent of its resources, in any action taken by the Security Committee for preventing or suppressing a use of force. Other States should be obligated to refrain from interference with any action taken by the Security Committee in execution of its powers. (c) The Security Committee should have power, subject to the approval of the Council, to organize the technical bodies necessary for the maintenance of peace, and to organize such regional committees as may be needed.

19. The Assembly should have power, by special majority vote including the votes of the States continuously represented in the Council, to prescribe limitations with respect to the size and type of armaments to be maintained by States, and to establish agencies and methods for the supervision and control of armaments.

IV. Settlement of Disputes between States

20. The Charter should proclaim the duty of each State to use none but pacific means in seeking to settle its disputes with other States.

21. The Permanent Court of International Justice should have jurisdiction over all disputes in which States are in conflict as to their respective legal rights and which are not pending before the Council, such jurisdiction to be exercised upon an application by any party to the dispute.

22. (a) The Council should have power, acting on its own initiative or at the request of any State, to take cognizance of any dispute between States which is not pending before the Court. If it does not succeed in bringing about a settlement of the dispute by other means, the Council should have power, by two-thirds vote including the votes of the States continuously represented, to give a decision binding on the parties to the dispute. (b) The Council should be authorized to transfer a dispute to the Assembly, and the Assembly should thereupon have power, by two-thirds vote including the votes of the States continuously represented in the Council, to give a decision binding on the parties to the dispute. (c) In dealing with a dispute the Council or the Assembly should have power, by simple majority vote, to request the Permanent Court of International Justice to give an advisory opinion on any legal question connected with the dispute. (d) A State which is a party to a dispute should not have a vote on any question relating to the dispute, either in the Council or in the Assembly.

23. (a) In the event of a failure by a party to a dispute to comply with a decision of the Permanent Court of International Justice or of the Council or Assembly, the Council should have power, by two-thirds vote including the votes of the States continuously represented, to take such action as it may deem to be necessary for giving effect to the decision. (b) A State should not have a vote in the Council when its failure to comply with a decision is under consideration.

V. Promotion of the General Welfare

24. (a) The Charter should proclaim the duty of each State to coöperate in measures to be taken for the extension of human freedom and for the satisfaction of human needs. (b) The Assembly should have power to organize coöperation among States directed to the furtherance of these aims.

25. (a) The Assembly should have power to create and maintain such special agencies, general or regional, as may be needed for promoting the general welfare, and to define the powers of these agencies. (b) The Charter should particularly envisage the need for creating or continuing special agencies to facilitate international coöperation with respect to such matters as:

(1) International trade.
(2) International finance and investments.
(3) International transport by land, sea, and air.
(4) International communications.
(5) International commodity arrangements.
(6) Food and agriculture.
(7) Public health and nutrition.
(8) Narcotics and other dangerous drugs.
(9) Population and migration problems.
(10) Cultural and scientific interchange.

26. The General Commission should have power, acting in accordance with policies adopted by the Assembly and subject to general control by the Assembly, to coördinate the activities of international agencies having specialized responsibilities.

27. (a) The Charter should proclaim the duty of each State to treat its own population in a manner which will not violate the dictates of humanity and justice. (b) The Charter should provide that any failure by a State to live up to this obligation is a matter of concern to the community of States, and the Assembly should have power to take cognizance of it as such.

28. (a) The Charter should proclaim the principle that the well-being and development of dependent peoples form a sacred trust of civilization. (b) To secure the performance of this trust, the Assembly should have power, by two-thirds vote, to recommend measures to be taken by States which have direct responsibility for dependent peoples. (c) The Assembly should have power to create permanent agencies, general and regional, which would report to the Assembly annually concerning the problems of dependent peoples. (d) The States which have direct responsibility for dependent peoples should

have a duty to make periodical reports to such agencies, and to permit such local investigations as the agencies may deem to be necessary.

29. The Assembly should have power to take the measures necessary to assure the effective execution of any mandate which may be conferred upon a State by the GIO, with respect to a particular territory.

30. The Assembly should have power to assume responsibility for the administration of any territory which may be placed under the direct control of the GIO, and to create the agencies which may be needed for such administration.

VI. Agreements between States

31. (a) The Charter should provide that every agreement entered into between States after the Charter becomes operative shall be registered with the Secretariat. (b) The Charter should provide that any organ of the GIO may disregard any agreement between States which is not registered with the Secretariat in accordance with the foregoing provision. (c) The Secretariat should publish the texts of all agreements registered.

32. The Permanent Court of International Justice should have jurisdiction, on application by any party to an agreement between States which has not been fully executed, to give a declaratory judgment that because of an essential change of circumstances the agreement has ceased to be binding.

33. (a) The Council should have power, by two-thirds vote and with the concurrence of the Assembly given by two-thirds vote, to advise the revision by the parties of any agreement between States which has not been fully executed, on the ground that it is not adapted to existing conditions. (b) If any party to the agreement fails to coöperate in the revision advised, the Permanent Court of International Justice should have jurisdiction, on application by any other party, to give a declaratory judgment that the agreement has become unduly onerous and has therefore ceased to be binding.

34. The Council should have power, by two-thirds vote and with the concurrence of the Assembly given by two-thirds vote, to advise the readjustment by the States concerned of any situation the continued existence of which might endanger good understanding between States.

VII. Supremacy of International Law

35. (a) The Charter should proclaim the duty of each State to carry out in full good faith its obligations under international law. (b) The Charter should provide that any failure by a State to carry out its obligations under international law is a matter of concern to the community of States, and the Assembly should have power to take cognizance of the failure.

36. (a) The Charter, as the basic instrument of international law, should prevail over all agreements between States. (b) The Assembly should have power, by two-thirds vote, to declare that any provision in an agreement between States is inconsistent with the Charter; for this purpose it should

have power, by simple majority vote, to request the Permanent Court of International Justice to give an advisory opinion. (c) Any provision in an agreement which is thus declared by the Assembly to be inconsistent with the Charter should not have legal effect.

37. (a) The Assembly should have power to adopt general conventions to be submitted to States for acceptance. (b) The Assembly should also have power, by two-thirds vote including the votes of the States continuously represented in the Council, to adopt general rules of international law which shall be binding on all States.

VIII. Amendment of the Charter

38. (a) The Charter should provide that amendments may be adopted by the Assembly by two-thirds vote including the votes of the States represented at the time in the Council, but that no vote on adoption may take place before one year has elapsed after the amendment was formally proposed. (b) An amendment should enter into force one year after its adoption by the Assembly, but if within that period formal objection has been expressed by as many as ten States the amendment should not enter into force unless within the following year it is again adopted by the Assembly by two-thirds vote including the votes of the States represented at the time in the Council.

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